Belgium
Belgique
Belgien
Bélgica

Branch Reporter
Daniel Garabedian*

1. Introduction

In accordance with the guidelines from the General Reporter, the emphasis of this report is placed on general principles of tax law; specific provisions will only be mentioned incidentally.

Broadly speaking, under Belgian tax law, legal form prevails over what might be viewed as the "economic substance" of a transaction, but legal substance prevails over the legal form if the actual legal rights and obligations of the parties are contrasted with any false appearance they might create, whether this be purportedly or otherwise. In short, and probably more accurately, legal reality prevails over the economic substance and the mere legal form of transactions.

Legal reality prevails over what can be viewed as the "economic substance" of a transaction because of two fundamental principles.

One principle is that of the "legality of tax". The authors of the Belgian Constitution viewed tax as an infringement of individual freedom and the right of property; the principle is that persons and goods are generally exempt from any levy, and tax is an exception which can be established by the legislature only (Constitution, article 170).[1] From this principle, it can be inferred that the tax laws should be interpreted and applied strictly.[2] In the case of doubt as to the meaning of a tax provision, the interpretation favourable to the taxpayer must prevail[3] and tax provisions cannot be applied by analogy.[4]

* Maître de conférences, Université libre de Bruxelles; avocat

1 See W. Ganshof van der Meersch, "L'impôt et la loi", *En hommage à Victor Gothot*, 1962, pp. 257 *et seq.*; Th. Afschrift, *L'évitement licite de l'impôt et la réalité économique*, 1994, §§63–64; Van Crombrugge, *De grondregels van het Belgisch fiscal recht*, 5th edn, 1999, §§63–64.

2 See e.g. Court of Cassation, 10 November 1997, *Pas.*, 1997, I, no. 464.

3 Court of Cassation, 24 October 1938, *Pas.*, 1938, I, p. 331; Court of Cassation, 28 May 1942, *Pas.*, 1942, I, p. 134.

4 Court of Cassation, 17 January 1924, *Pas.*, 1924, I, p. 127; Court of Cassation, 13 April 1978, *AC*, 1978, p. 928. See generally, E. Krings, "Le problème des lacunes en droit fiscal", in *Le problème des lacunes en droit*, Travaux du Centre national de recherches de logique, 1968, pp. 463–469; Afschrift, *op. cit.*, §§67–84; Van Crombrugge, *op. cit.*, §§8–11.

The other fundamental principle is that tax law is governed by private law, as a rule: concepts used in a tax statute should be interpreted in accordance with their private law meaning, and transactions entered into by taxpayers should be characterized in accordance with private law principles.[5]

Although the interpretation rule nevertheless leaves courts with a fair amount of discretion, as in the interpretation of any legal language,[6] and although there is nothing preventing the legislature from using economic, rather than legal, concepts in a tax provision,[7] it remains the case that the above two principles leave no room for any general "(economic) substance over (legal) form" approach in Belgian tax law. As a rule, legal form will prevail over what might be viewed as the economic substance of the transaction; courts cannot give priority to some "economic reality" that might be different from the reality of the contracts entered into by the parties without sham and of which they accept all the consequences.[8]

The situation is similar in purely private law relations, where no doctrine such as "(economic) substance over (legal) form" is received in Belgian private law; according to most writers, the same applies to the *fraus legis* doctrine.[9]

The "economic substance over legal form" approach may, however, make certain inroads into tax law when it comes to determining the taxable income of corporations and, more generally, enterprises. Indeed, that determination is governed, as a rule, by accounting law, where that approach is often advocated.[10]

2. Sham

Legal reality prevails over the mere legal form of transactions: only the genuine, and not the pretended, legal transaction entered into by the parties will be taken into account. The criterion here is the private law concept of sham, which is classically defined as follows:

5 Belgian law is based on a civil law, as opposed to common law, tradition. This principle is not embodied in a statute but is a settled court-based rule and generally supported by scholars. See Court of Cassation, 9 July 1931, *Pas.*, 1931, I, p. 886, and Court of Cassation, 13 March 1986, *Pas.*, 1986, I, p. 886; F. Dumon, "Les impôts directs, l'Etat de droit et la Constitution", *JDF*, 1984, p. 17; P. Van Ommeslaghe, "Droit commun et droit fiscal", *JDF*, 1989, pp. 5 *et seq.*; Afschrift, *op. cit*., §§96–98; Van Crombrugge, *op. cit.*, §§39–40 and 42.

6 Cf. e.g. Van Crombrugge, *op. cit.*, §8.

7 See e.g. the concept of "abnormal or gratuitous advantage" used in art. 26 of the Income Tax Code 1992 (hereinafter ITC). See also the examples of cases given below, section 6.1.

8 See Court of Cassation, 29 January 1988, *AC*, 1987–88, no. 329. On the so-called theory of "economic reality" and its condemnation by the Court of Cassation, see J. Kirkpatrick, *Le régime fiscal des sociétés en Belgique*, 2nd edn, 1995, §§1.23–1.26; Afschrift, *op. cit.*, §§127–157.

9 See e.g. X. Dieux, "Tendances générales du droit contemporain des obligations. – 'Réforme et contre-réforme'", in *Les obligations contractuelles*, Jeune Barreau Bruxelles, 2000, pp. 38–40, §28. Whatever the discussions in private law, there is no discussion about the fact that the *fraus legis* doctrine is not received in Belgian tax law (see below, section 5.1, the landmark judgments on tax avoidance).

10 See D. Garabedian, "Bénéfice imposable et droit comptable", *RCJB*, 2000, pp. 539 *et seq.*, and especially the literature cited in footnote 74.

> "there is sham where the parties outwardly enter into an act whose effects they agree to modify or destroy by another contract, which remains secret. Sham thus pre-supposes two contracts, each contemporaneous with the other, but one of which is intended only to lay a false scent. There exists only one real contract, the secret contract."[11]

In other words, the test is: did the parties accept all the legal consequences of the contract presented to the tax authorities, or is there a secret contract which modifies any or all of the legal consequences of the apparent one? This secret contract need not be in writing.[12]

There can be different degrees of sham. Sometimes it is limited to one element of the legal transaction: for instance, with a view to evading part of the registration duty calculated on the purchase price, the parties to a real estate purchase agreement mention a price of EUR 250,000, whereas the price really agreed upon amounts to EUR 350,000. In other cases, sham affects the legal characterization of the transaction: for instance, again in order to evade registration duty, the parties disguise a gift of real estate as a sale, by mentioning in the agreement a price which they agree will not be paid. Sham can affect the very existence of the legal transaction: the parties sign a sale agreement but secretly agree that it should be deemed to be non-existent. A last form of sham concerns who it is that is the actual party to the transaction: A, B and C may agree that the contract be presented as being between A and B but is actually between A and C.

Sham can not only affect isolated legal transactions but can also consist in presenting as independent different legal transactions between which the different parties have secretly agreed to establish such a link that their legal content is modified in some respect.

The scheme considered in a judgment of 26 October 1982 by the Court of Appeal of Brussels[13] is a good example of this, although the court based its decision on other legal reasons. The taxpayer forewent the severance payment to which he was entitled whilst the parent company of his employer agreed to purchase shares from the taxpayer's spouse at a price above their fair market value. The two transactions were presented as independent, whereas in reality the one was the consideration for the other.[14]

A peculiar situation is where the parties conceal the existence of an undisclosed agency contract behind the front of a contract that mirrors that which the agent enters into with a third party for the account of the principal. For instance, A and B

11 H. de Page, *Traité élémentaire de droit civil*, vol. II, 3rd edn, 1964, §618 (free translation from French original). For a recent synthesis of the state of play on sham in Belgian private law see P. Van Ommeslaghe, "La simulation en droit des obligations", in *Les obligations contractuelles*, Jeune Barreau Bruxelles, 2000, pp. 147 *et seq.*

12 Van Ommeslaghe, *op. cit.*, in *Les obligations contractuelles*, pp. 153–154, §9.

13 *FJF*, no. 82/153.

14 For comments on this case, see J. Kirkpatrick, "Examen de jurisprudence. Les impôts sur les revenus et les sociétés", *RCJB*, 1984, pp. 703–704, §21, and the literature cited therein; Afschrift, *op. cit.*, §§195–198, who considers, however, that there is no sham but simply incorrect characterization.

enter into an agency contract that provides that B will enter into a loan agreement with an unrelated borrower in its own name but for the account of A. Remittance, first by A to B of the amount lent, and later by B to A of the interest and capital repayments by the borrower, merely constitutes performance of the agency contract between A and B. Yet, with the view to hiding from the tax authorities the fact that A is the true lender and that it is he who receives the interest from the unrelated borrower, A and B disguise these aspects of the agency agreement as a sham loan contract.

Whereas, in private law relations, third parties confronted with a sham may freely choose to rely either on the apparent contract or on the real one (Civil Code, article 1321), the tax authorities are denied this choice: the taxpayer can require that the tax be assessed on the basis of the genuine contract.[15] This solution derives from the fact that tax law provisions are rules of public policy, and is often expressed by the maxim that "tax is based on reality" – or, more accurately, on legal reality.[16]

3. Transactions incorrectly characterized

There is incorrect characterization where the parties give their contract, or a legal transaction in the more general sense, a legal characterization that is incompatible with its content.

This situation is often a consequence of the true content of the contract being different from that presented by the parties, but not necessarily. In any event, the tax must be assessed on the basis of the correct legal characterization.[17]

4. Rights and obligations under the contract will probably not be enforced

The General Reporter asks how the tax law of each jurisdiction deals with the situation where the characterization given by the parties reflects the legal relations under the contract but there is reason to believe that conditions which are important in relation to the taxation issue will not be enforced in practice. The General Reporter cites the example of the English *Duke of Westminster* case (discussed in detail in the branch report for the UK).

15 See Court of Cassation, 4 January 1991, *AC*, 1990–91, p. 466; Court of Cassation, 19 May 1995, *AC*, 1995, no. 247.

16 See J. Kirkpatrick, "Le droit fiscal se fonde sur les réalités", *JPDF*, 1969, pp. 161 *et seq.*; Afschrift, *op. cit.*, §§131–140.

17 This situation should be distinguished from that where the legal characterization given by the parties is not incorrect but the contract is susceptible to being given another correct legal characterization. In such a case, the legal characterization given by the parties may not be disregarded unless the general anti-abuse provision applies (see below, section 5.3).

Belgian tax law does not have a specific rule for that situation. From a legal point of view, if the rights and obligations set forth in the contract are real, there is no sham and the contract cannot be disregarded or be given another characterization. In practice, however, the fact that it is unlikely that the contract will actually be enforced might be used by the court to infer that it was the parties' real intent not to be bound by the contract, thus using presumption as a means of evidence of a sham (see below in section 5.1 for further details). The *Duke of Westminster* scheme would most probably have been considered as a sham under Belgian law.[18]

5. Tax avoidance

5.1. General

The principle of the "legality of tax", on the one hand, and the principle that tax law is governed by private law, on the other (see above, section 1), are the basis of what is called the "free choice of the least taxed route", as the Court of Cassation expressed it in its *Brepols* judgment of 1961 and confirmed in the *Au Vieux Saint-Martin* case in 1990, rejecting in turn the *fraus legis* and "economic reality" doctrines: "There is no sham, or, therefore, tax fraud, where, in order to enjoy a more favourable tax treatment, and using the freedom to contract, without however violating any legal obligation, the parties enter into acts of which they accept all the consequences, even if the form they give thereto is not the most usual one" (Court of Cassation, 6 June 1961, *Brepols*) and "even if these acts are entered into with the sole purpose of reducing the tax burden" (Court of Cassation, 22 March 1990, *Au Vieux Saint-Martin*).[19] Thus, as a matter of principle, tax avoidance is effective unless there is sham within the meaning of that concept in private law and the tax authorities can prove it.[20]

In practice, cases where sham has been held to exist are less exceptional than one might think – for two reasons.

One is that, in order to prove the existence and terms of the sham, the tax authorities can use all means of evidence, including "presumption of fact", by which the judge assumes one fact from another fact or group of facts, and which is "left to the insight and wisdom of the judge" (Civil Code, article 1353). Thus, the court might decide that the facts and circumstances surrounding the transaction demonstrated that the parties' real contract was different from the one they presented. It is true that the taxpayer should be given the benefit of the doubt in this respect since the burden of proof lies with the tax authorities, but this prin-

18 *Accord*: Afschrift, *op. cit.*, §59.

19 Court of Cassation, 6 June 1961, *Pas.*, 1961, I, p. 1082, and Court of Cassation, 22 March 1990, *Pas.*, 1990, I, p. 853 (free translation of French original).

20 And of course unless the general or a specific anti-avoidance provision applies. The general anti-avoidance provision is dealt with later in this report.

ciple is not always strictly adhered to in practice and, since the matter is a determination of fact within the absolute discretion of the court, the Court of Cassation may not review what a lower court finds to be presumption evidence, unless the judge's assumption is either based on a fact which is itself unproven[21] or incapable of justification.[22]

The other reason is that, when confronted with aggressive tax schemes, courts sometimes find that there is a sham in circumstances hardly compatible with that legal concept and the Court of Cassation will reject the appeal on the ground that the decision was based on factual determinations, which are outside its power of review.[23]

5.2. Specific anti-avoidance rules

The "freedom to choose the least taxed route" has for a long time been trammelled by specific anti-avoidance provisions incorporated at intervals into the Tax Codes. There was a tendency for them to multiply in the late 1980s. Some examples are mentioned incidentally later in this report.[24]

5.3. Written, general anti-avoidance rule

A statute of 22 July 1993 eventually introduced a general anti-avoidance provision into the Income Tax Code, which was soon extended to registration duty. Embodied in article 344(1) of the Income Tax Code 1992 (ITC) (and in similar terms in article 18(2) of the Registration Duties Code), this provision, often called the "anti-abuse provision", reads as follows (spacing added):

> "The legal characterization given by the parties to an act
>
> or to separate acts that bring about the same operation
>
> is not binding on the direct taxation authorities where those authorities determine, by means of presumption of other evidence admitted by [law], that that characterization is aimed at avoiding taxes

21 See e.g. Court of Cassation, 5 March 1999, *Pas.*, 1999, I, no. 133.

22 See e.g. Court of Cassation, 17 April 1998, *Pas.*, 1998, I, no. 198; Court of Cassation, 28 January 1999, *Pas.*, 1999, I, no. 52.

23 See e.g. Court of Cassation, 4 January 1991, *AC*, 1990–91, p. 466; Court of Cassation, 20 February 1986, *Pas.*, 1986, I, p. 783.

24 For a (non-comprehensive) list, see e.g. D. Garabedian, "Politique belge de prévention de l'évasion fiscale. Une introduction à l'usage des non-spécialistes", in *Les paradis fiscaux et l'évasion fiscale*, Actes des journées d'études des 20–21 janvier 2000 du Centre de droit international de l'Université libre de Bruxelles, 2001, pp. 195 *et seq.*, §§9 and 13. For an analysis of some of these provisions, see C. Docclo, Belgian report on subject II of the 2001 Congress, *Limits on the Use of Low-tax Regimes by Multinational Businesses: Current Measures and Emerging Trends*, *Cahiers de droit fiscal international*, vol. LXXXVIb, pp. 399 *et seq.*

unless the taxpayer prove that that characterization is justified by legitimate needs of a financial or economic nature."[25]

In the absence of any case law as yet, the meaning of the provision has to be determined on the basis of (a) its wording, which is rather complex, (b) the legislative history to the provision, which although not free from any ambiguity gives some helpful indications, and (c) the opinions of scholars, which are divergent on a number of aspects. Whether the following analysis will be followed by courts thus remains to be seen.

The provision targets legal characterizations that are chosen exclusively for tax avoidance purposes, through a system of evidence and counter-evidence: the tax authorities have the burden of proving the purpose of tax avoidance; the anti-abuse provision will then be set aside if the taxpayer can prove that he also had a legitimate (i.e. non-fiscal) commercial purpose.[26] For this reason, the provision applies only within the realm of economic activities, not the management by a taxpayer of his/her private assets.[27] The question of the existence of a legitimate commercial purpose can be dealt with in an advance ruling; in practice, the administrative commission in charge of rulings procedures will deny a ruling where the arguments in favour of a commercial purpose are of a general nature, such as a reduction in general administration and accounting costs.[28] In my view, the only commercial purpose that can be disregarded is one that is so limited that a reasonable person would not have structured the transaction in the same way for that sole purpose.[29]

As is shown by its wording, this provision lies at the heart of the issue of how tax law deals with the problem of the legal characterization of a legal transaction.

The provision only applies to legal acts (contracts, decisions by a general meeting of shareholders or some other body of a corporation, etc.)[30] and not to mere facts (such as transferring one's residence to a foreign country in order to

25 Free translation of French original text which reads as follows: "N'est pas opposable à l'administration des contributions directes, la qualification juridique donnée par les parties à un acte ainsi qu'à des actes distincts réalisant une même opération lorsque l'administration constate, par présomptions ou par d'autres moyens de preuve visés [par la loi], que cette qualification a pour but d'éviter l'impôt, à moins que le contribuable ne prouve que cette qualification réponde à des besoins légitimes de caractère financier ou économique".

26 See *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, pp. 93 and 100. See also *Doc. Parl.*, Sénat, 1992–93, no. 762-2, pp. 46 and 55, and practice note of 6 December 1993, *Bull. contr.*, no. 735, 1994, p. 289, §24.

27 This is why, although also formally applicable to inheritance tax (Succession Duties Code, art. 106(2)), the provision has remained a dead letter in that field (practice note of 20 November 1996, *RGEN*, no. 24,682, 1997, p. 29).

28 See Report of the Commission des avis fiscaux préalables, *Bull. contr.*, no. 758, 1996, p. 552.

29 *Accord*: Van Crombrugge, "De invoering van het leerstuk van fraus legis of wetsontduiking in het Belgisch fiscaal recht", *TRV*, 1993, p. 284, §20; L. Hinnekens, "Belgium. Uncertainties in the Interpretation of the General Anti-Avoidance Statute", *European Taxation*, 1999, p. 339. Cf. Afschrift, *op. cit.*, §§459–461.

30 An act is defined as follows in the parliamentary records: an act within the civil law meaning, i.e. an expression of will intended to produce legal effect (*Doc. Parl.*, Sénat, 1992–1993, no. 762-1, p. 3).

enjoy a more favourable tax treatment) or refraining from entering into a legal transaction.[31]

It does not empower the tax authorities to set aside the act itself but only the legal characterization which the parties have given to it.[32]

Nor does it empower the tax authorities to assess the tax on the basis of some "economic reality" independently from a legal analysis of the transaction.[33]

The legislative history also indicates that the provision does not invalidate what is provided in other provisions of the ITC: for instance, where a corporate merger meets the conditions for a tax exemption provided for by article 211 of the ITC, the tax authorities cannot deny this exemption by citing the general anti-abuse provision.[34]

The delicate question raised by article 344(1) is what the tax authorities can do once they have set aside the legal characterization that had been given by the parties to their legal transaction. In other words, how can they characterize the legal transaction for the purpose of applying tax law?

Some writers consider that the tax authorities can replace the legal characterization chosen by the parties by the closest legal characterization that results in a tax charge in accordance with the goal and purpose of the legal provision whose application the taxpayer sought to avoid. Article 344(1) would thus introduce the doctrine of *fraus legis* into Belgian tax law.[35]

The wording and legislative history of the provision, however, point towards a narrower interpretation, which is adopted by the majority of scholars.[36] Article 344(1) enables the tax authorities to set aside the legal characterization the parties have given to their legal transaction (if it was given for the purpose of tax avoid-

31 *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, pp. 99 and 101; practice note of 6 December 1993, *op. cit.*, pp. 286–288, §17.

32 *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 99.

33 *Ibid*., p. 42.

34 *Ibid*. This is without prejudice to whether the merger might be recharacterized as part of a broader scheme that realizes one and the same "operation" within the meaning of art. 344(1). This concept is analysed later in the report.

35 See especially Van Crombrugge, *op. cit.*, *TRV*, 1993, p. 286, §24; Van Crombrugge, "Vennootschappen met rechtspersoonlijkheid in het fiscaal recht", in *Rechtspersonenrecht*, Postuniversitaire Cyclus Willy Delva 1998–1999, 1999, pp. 320–325, §§11–15, and pp. 329–334, §§21–27. See also P. Faes, *Het rechtsmisbruik in fiscale zaken of de keuze van de minst belaste weg op het vlak van de inkomstenbelastingen na de wet van 22 juli 1993*, 1994, §§102–126; for other writers who share that interpretation, see footnote 59 of the last-cited work by Van Crombrugge. Having proposed that interpretation, S. Van Crombrugge and P. Faes conclude that art. 344(1) infringes the principle of the "legality of tax" provided for in art. 170 of the Constitution, which prohibits the application of tax provisions by analogy (cf. section 1 above). This conclusion appears to condemn the proposed interpretation, since it is a matter of principle that statutes must be given an interpretation in conformity with the Constitution to the fullest extent possible (see judgment no. 11/97 of the Arbitration Court (Belgium's Constitutional Court), 5 March 1997, *Arr. CA*, 1997, p. 141; cf. also its judgment no. 6/97, 19 February 1997, *Arr. CA*, 1997, p. 77.

36 See especially Afschrift, *op. cit.*, §§266–284 and 304–305. See also Kirkpatrick, *op. cit.*, §§1.33–1.44; Garabedian, *op. cit.*, pp. 207–210, §14. Cf. also M. Dassesse and P. Minne, *Droit fiscal. Principes généraux et impôts sur les revenus*, 4th edn (with the collaboration of R. Forestini),

ance) but it does not discharge the tax authorities from their obligation of applying the tax laws on the basis of a legal characterization that is correct under private law. In other words, the tax authorities will be able to use article 344(1) only where there is room for more than one legal characterization under private law.

This condition will rarely be met in the case of a single transaction.[37] One conceivable example might be a contract which the parties have characterized as constituting a usufruct, and have done so correctly but in order to avoid the tax charge attaching to a lease where the contract could correctly be characterized as a lease.[38]

In fact, the anti-avoidance provision will be most useful in cases of what article 344(1) refers to as "separate acts that bring about the same operation" and to which the parties have given a "characterization [that] is aimed at avoiding taxes".

What the wording is targeting here, we are told by the legislative history, is "the artificial dismemberment of an operation into a number of successive acts" that are linked by a "unity of intent". This requires "that the successive acts represent a series of acts conceived from the outset as forming part of an inseparable chain". When confronted with such an "operation", "the authorities may levy the tax on the basis of a legal characterization that disregards that given to each of the legal acts taken separately".[39]

The legislative history indicates more precisely that article 344(1) is in this respect "the application in Belgian law of the English 'step by step' doctrine as laid down in a line of cases from the House of Lords".[40] Reference is thus made to the doctrine initiated by the House of Lords in *IRC* v. *Ramsay* (1981)[41] and developed in *Furniss* v. *Dawson* (1984).[42]

That doctrine is therefore an important element for the interpretation of this aspect of article 344(1) and the reader of this report will find it useful to read the detailed analysis of the doctrine in Richard Ballard and Paul Davison's branch report for the UK, on which this analysis relies heavily. One must bear in mind, however, that the Belgian legislature necessarily referred to the doctrine as it had been developed at the time article 344(1) was enacted (1993) and that later cases, in particular the recent *Westmoreland*[43] case that has revised the doctrine, are of no significance here; since

cont.

1996, pp. 77–81; J. Malherbe, *Droit fiscal international*, 1994, p. 681. In the legislative history, see the note tabled by the Minister of Finance before the Chamber Finance Committee, *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, especially p. 99, §19, and p. 101, §24, and the verbal explanation by the Minister of Finance before the Senate Finance Committee, *Doc. Parl.*, Sénat, 1992–93, no. 762-2, pp. 37–38. Cf. also practice note of 6 December 1993, *op. cit.*, p. 285, §14, and p. 288, §22. For a summary of the various interpretations that have been proposed, see Hinnekens, *op. cit.*, pp. 340–342.

37 As the Minister of Finance recognized during the provision's passage through Parliament: *Doc. Parl.*, Sénat, 1992–93, no. 762-2, p. 37.

38 Example given by Afschrift, *op. cit.*, §§386–389.

39 *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 101 (free translation of French original).

40 *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 101 (free translation of French original); see also *Doc. Parl.*, Sénat, 1992–93, no. 762-2, p. 38.

41 [1981] STC 174.

42 [1984] STC 153.

43 *MacNiven* v. *Westmoreland Investments Ltd* [2001] STC 237.

being enacted in Belgian legislation, the interpretation of article 344(1) has been a matter within the exclusive domain of Belgian law and the Belgian courts.

In his often quoted words in *Craven* v. *White* (1988), Lord Oliver summarized the four essential requirements for the application of the *Ramsay* doctrine (spacing added):

> "(1) that the series of transactions was, at the time when the intermediate transaction was entered into, preordained in order to produce a given result;
> (2) that that transaction had no other purpose than tax mitigation;
> (3) that there was at that time no practical likelihood that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life; and
> (4) that the preordained events did in fact take place."[44]

Accordingly, the concept of "separate acts that bring about the same operation" can be defined as a series of transactions that was preordained at the time when the intermediate transaction was entered into. A transaction will be part of one and the same "operation" if there was at that time no practical likelihood that the pre-planned events would not take place, because the principal terms of the composite transaction had been agreed to the point where there was no practical likelihood that the transaction which actually took place would not take place.[45]

Where there is one and the same "operation", whose intermediate transactions have been inserted for the purpose of avoiding taxes, article 344(1) allows the tax authorities to consider the parties' legal situation as it was prior to the first act comprising the "operation" and as it is after the last one; it entitles the tax authorities to give the "operation" a legal characterization without having regard to that of each transaction considered independently.[46]

[44] [1988] STC 476 at 507.

[45] On this interpretation of the concept of one and the same "operation", see Afschrift, *op. cit.*, §§403–408; Kirkpatrick, *op. cit.*, §1.38. For a comparison between the "step transaction" doctrine and art. 344(1) ITC, see O. Bertin, "La 'step transaction doctrine' et l'article 344, § 1er, CIR", *RGF*, 1994, pp. 44 *et seq.*

Presumably, the existence of the preordination may sometimes be inferred from the fact that one party would be in an unsustainable situation had the subsequent transaction not been realized. This might happen where the parties involved were closely connected, so that they necessarily knew each other prior to the first transaction. For instance, in his capacity as the sole shareholder of corporation X, A votes a reimbursement of capital that X, having no cash, satisfies by taking a short-term loan from a bank. A then extends a loan to X in order to enable X to reimburse the bank. The reimbursement of capital and the loan constitute one and the same "operation" because the financial position of X shows that it would never have made the first without knowing that the second would follow (example given by Afschrift, *op. cit.*, §406, who follows a slightly different analysis to conclude that there is one and the same "operation". As that writer points out, *op. cit.*, §414, art. 344(1) will not, however, have any effect on the tax treatment of those two transactions, because the "operation" is not susceptible to any other legal characterization than a reimbursement of capital followed by a loan).

[46] *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 101.

Article 344(1) does not go further than that; consequently, the tax must still be assessed on the basis of a legal characterization that correctly accounts for the parties' legal situation under private law.[47] This is a matter of Belgian law, for which concepts of English law are not relevant.[48]

Thus, it might happen that a series of transactions constituted one and the same "operation" within the meaning of article 344(1) but that this article would not apply because there was no alternative legal characterization that correctly accounted for the legal situation of the parties prior to and after the series of transactions.

Case 2b submitted by the General Reporter is an example of a dividend-stripping scheme realized through two opposite transactions having no other purpose than the saving of tax. Such a circular scheme is an obvious example of what constitutes one and the same "operation". Article 344(1) allows the tax authorities to disregard the two transactions altogether since A is in exactly the same position as if it had kept the shares all the time and earned the dividend.[49] It was a circular scheme that was considered in the *Ramsay* case.

In case 5a submitted by the General Reporter, A sells shares to his wholly owned company, B, at their book value and, a few days later, B sells the shares to an unrelated party, C, at a considerably higher market value. The House of Lords considered such a scheme in the *Furniss* and *Craven* cases, with the difference, which is not material in this context, that the transfer from A to B was in exchange for the issuance of shares and not for cash.

The first question is: do the two transactions realize one and the same "operation" within the meaning of article 344(1)? The answer depends on how far the sale from B to C had progressed when the sale from A to B took place. There is one and the same "operation" if the shares were already the subject of a binding sale contract between A and C, and also if the principal terms of that sale had been agreed between them to the point where there was no practical likelihood that the transaction would not take place.[50] By contrast, the answer would be negative if A had sold the shares to B at a time when there was still a reasonable likelihood that the sale to C would not take place. The facts of the combined appeals involved in *Craven* v. *White* were such that the House of Lords held that there was no preordained transaction because, as is summarized by the branch reporters for the UK, in one case, the taxpayer determined only after the first transaction which of two alternative transactions should be pursued; in the second case, the intended purchaser pulled out of negotiations after the first step; in the third case, a different purchaser was found; and, in the fourth case, the negotiations with the ultimate purchaser broke down, eventually resumed and ended with a sale on different terms. In other words, the mere preparation of a tax-favourable situation is not sufficient.[51]

47 See especially Afschrift, *op. cit.*, §§411–415; Kirkpatrick, *op. cit.*, §§1.39–1.40.

48 Afschrift, *op. cit.*, §398; Faes, *op. cit.*, §206.

49 Cf. Afschrift, *op. cit.*, §§429–435, with regard to other circular transactions.

50 That was obviously the case in *Furniss*, since the two transactions were carried out within a few minutes of one another.

51 Afschrift, *op. cit.*, §402. See also, in the branch report for the UK, the discussion on whether the *Ramsay* principle could apply where the fiscally planned transaction is an auction sale.

The second question is: were the legal characterizations given by the parties to the legal transactions that formed the "operation" aimed at avoiding income tax (or registration duties)? The case submitted assumes it was.

If the answer to the first two questions is in the affirmative, then the third question is: can the "operation", thus determined to exist, be given a legal characterization that correctly accounts for the legal position of the parties to the different legal transactions involved, as it stood prior to the first transaction and as it stands after the last transaction? Indeed, the "operation" can be characterized as a direct sale from A to C for a price paid, at A's direction, to B.

At this point, the taxpayer can still avoid the application of article 344(1) by showing that the legal characterization given to the transactions met some "legitimate needs of a financial or economic nature".

In case 5f, A buys the shares of company B from C with the purpose of acquiring B's assets through a liquidation. The sale between A and C and the distribution from B to A as part of the liquidation of B could not be treated as one and the same "operation" under article 344(1). There is no "artificial dismemberment of an operation into several successive acts", as the Minister of Finance put it on the Act's passage through Parliament. In other words, neither of the two steps was entered into with no other purpose than tax mitigation.[52] In addition, a recharacterization of the two successive transactions as a sale of company B's assets would be permissible only if it accounted for the fact that B was liquidated.[53] Now, B's liquidation cannot reasonably be deemed to have been preordained prior to A's purchasing the B shares since, until that time, B was represented by C (or a person related to C) who was not interested in planning that liquidation.

In case 5c, A sells shares in company B on the stock exchange at a loss and C, his wholly owned company, simultaneously buys the same number of shares in company B on the stock exchange.

Obviously, the two transactions cannot be disregarded altogether as if they were a circular transaction because, at the end of the day, it is no longer A, but C, that owns shares in company B.

A trickier question is whether the tax authorities could assess the tax as if A had sold the shares to C – a question that is relevant only if it is assumed that A's loss would not be allowed in the case of sale to a related company whereas it would be in the case of sale on the market. It is reasonable to consider that there was a third contract or at least an understanding between A and C under which the latter was to purchase the same number of shares in the same company as those sold by A. Indeed, without such an undertaking, A would not have disposed of his shares. Thus, from the point of view of A and C, the sale and purchase of the shares were preordained and realize one and the same "operation". Never-

[52] Cf. Afschrift, *op. cit.*, §§424–427, who analyses this example when studying which legal characterization the tax authorities can give to the transactions and concludes that here the transactions are not susceptible to another characterization to that given by the parties.

[53] Recharacterization as a sale of B's assets would imply that either B sold its assets to A and then distributed the proceeds of the sale to C as part of its liquidation, or that B first liquidated and distributed its assets to C, who would then have sold the assets to A.

theless, we doubt very much that article 344(1) would allow recharacterization as a direct sale from A to C because the scheme involves parties that have nothing whatsoever to do with the scheme (the buyer from A and the seller to C). Thus, from the point of view of the unrelated buyer and unrelated seller, the purchase and sale transactions are not preordained and, moreover, do have a non-tax, commercial purpose. The purchase and sale transactions therefore could not be given any other legal characterization, let alone be considered as non-existent – which would be necessary in order to recharacterize the "operation" as a direct sale from A to B.

For the same reason, we do not think that article 344(1) could be used to treat two opposite transactions that the same corporation realizes on the market as non-existent.[54]

Finally, it should be mentioned that the enactment of the general anti-avoidance provision had no impact on the many specific anti-avoidance rules that can be found in the tax laws. Most of these target tax avoidance schemes that are beyond the reach of the general provision. Where both types of provisions can apply, some authorities suggest that the general anti-abuse provision cannot be used indirectly to extend the reach of the specific anti-abuse provision.[55]

5.4. Court-based anti-avoidance rules

The words "without however violating any legal obligation" in the Court of Cassation's landmark cases of *Brepols* and *Au Vieux Saint-Martin* (see section 5.1 above) have been interpreted by some scholars as meaning that the tax authorities can disregard a transaction if it violates a non-tax statute.[56] The Court of Cassation seems to have been influenced by that interpretation in a judgment of 5 March 1999, where the Court ruled that the tax authorities could ask that a legal transaction be disregarded for tax purposes where the transaction was free from any sham but violated a non-tax legal provision of public policy, for the purpose of tax avoidance.[57]

Most writers have criticized this ruling as lacking legal grounds and relying on a mistaken interpretation of the cited wording of the *Brepols* and *Au Vieux Saint-Martin* judgments. This wording does not refer to the violation of a legal *provision* but of a legal *obligation*, and purports, in response to the proponents of the *fraus*

54 Cf. Afschrift, *op. cit.*, §§429–434.

55 *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 42. However, this does not prevent art. 344(1) possibly applying to a single operation that included a transaction especially dealt with in a specific provision.

56 See especially Van Crombrugge, *op. cit.*, §35, p. 47.

57 *AC*, 1999, no. 134. The case involved a pharmacist who had sold his business to a newly formed corporation, with the view to realizing a gain taxed at a reduced rate and enabling the acquiring corporation to depreciate the goodwill. However, the price provided for in the contract, although not above the market value of the business, exceeded the legal limit provided by a specific statute aimed at regulating sales of pharmacies. The Court of Cassation held that the lower court could legally decide that for tax purposes the corporation could not depreciate that part of the price which was above the legal ceiling.

legis doctrine, to stress that the taxpayer does not violate any legal obligation by choosing the least taxed route.[58]

5.5. Place in Belgian tax law of the "step transactions", "business purpose" and "substance over form" doctrines

Belgian courts have not developed anti-avoidance doctrines – with the exception of the recent, and to date isolated, judgment by the Court of Cassation on infringement of a legal provision of public policy mentioned in the previous section, which is in any event limited in scope.

As indicated above, in section 5.3, the UK "step transaction" doctrine is embodied in the concept of "separate acts that bring about the same operation" contained in the general anti-abuse provision.

The "business purpose" doctrine is echoed in the concept of "legitimate needs of a financial or economic nature", which is used in the general anti-abuse provision (section 5.3) and in a number of specific provisions that require fulfilment of that condition before a tax deduction or exemption will be granted.[59]

As we have seen above, the "substance over form" doctrine is not applicable in Belgian tax law. The general anti-abuse provision allows the recharacterization of a transaction or series of transactions that bring about one and the same "operation", but only to the extent that the legal characterization or characterizations given by the parties were exclusively tax driven and the transactions can be given another legal characterization which is correct under private law. Only to this extent is the taxpayer denied any free choice between two transactions that lead to the same result.

5.6. Situation where all or part of a transaction takes place outside Belgium

Because of the territorial nature of tax law, Belgian taxes will, as a rule, be assessed without regard to the legal characterization or, more generally, the treatment of the transaction under foreign tax law.

The situation is different for foreign private law. The principle that tax law is governed by private law extends to Belgian conflicts of laws rules, so that foreign

[58] See J. Kirkpatrick, "L'opposabilité au fisc des conventions illicites non simulées. A propos de l'arrêt de la Cour de cassation du 5 mars 1999", *JT*, 2000, pp. 193 *et seq*. See also Afschrift and Danthine, "La licéité de principe des ventes simultanées d'actifs et d'actions d'une société dans le but d'éviter l'impôt", *JDF*, 2000, p. 238, §60; P. Faes, "Vennootschapsbelasting. Niet tegenwerpelijkheid van rechtshandelingen: Cass., 5 maart 1999", *DAOR Act.*, 2000/1, p. 9; Garabedian, *op. cit.*, pp. 201–202, §8.

[59] For instance, ITC arts. 46 and 211: income tax exemption for corporate reorganizations in the form of a merger, a split, or a contribution of a line of business or of all an entity's assets and liabilities; ITC art. 207: deduction of carryover losses following a change of control of the corporation. In this context, the "business purpose" test does not pertain to the legal characterization of the transaction, as in the general anti-abuse provision, but to the legal transaction itself; arguably, the condition is met whenever the transaction has a business purpose even where the choice of the legal route for achieving that purpose is exclusively tax driven.

private law will determine the characterization of the transaction for Belgian tax purposes whenever the conflicts rule points towards foreign law.[60]

5.7. Can the taxpayer invoke the tax avoidance rules or doctrines in his favour?

We have indicated above, in section 2, that not only the tax authorities but also the taxpayer can invoke sham and ask that the tax be assessed based on the genuine transaction. Whether the same applies for anti-avoidance provisions depends on the nature of the anti-avoidance provision in question. If the provision defines the substance of the taxable income, the answer is in the affirmative for the same reason that entitles the taxpayer to invoke its own sham: the rule that tax law is a matter of public policy and that taxes must be assessed in accordance with the law. On the other hand, if the anti-avoidance provision is designed as a procedural tool in the hands of the tax authorities, only they can invoke it.

An example of the first type is article 18(4) of the ITC, which recharacterizes certain interest payments as dividends; an example of the second is article 54, which denies the deduction of certain expenses. The general anti-abuse provision of article 344(1) seems to belong to the second type since it applies where "*the authorities* determine that [the] characterization is aimed at tax avoidance" (emphasis added); indeed, it appears in the section of the Code on the means of evidence that can be used by the tax authorities.

5.8. Penalization of tax avoidance

Tax avoidance is not subject to criminal or administrative penalties as such. A tax avoidance provision will lead to penalty if its effect is that the taxpayer's tax return was not properly filled in. This has to be determined on a case-by-case basis.

The tax authorities have indicated that recharacterization pursuant to the general anti-avoidance provision will not be deemed to imply tax fraud; only minor administrative penalties will therefore be applicable.[61]

6. Characterization issues where there is no sham, mischaracterization or tax avoidance

6.1. Uncertainty as to the legal concept used in tax law

Another type of characterization issue arises where tax law is unclear as to what concept of private law it refers to or even whether it refers to a concept of private law at all.

[60] See e.g. Brussels Court of Appeal, 4 June 1974, *JDF*, 1975, p. 82.

[61] Practice note of 6 December 1993, *op. cit.*, pp. 289–290, §§27–28. See generally Afschrift, *op. cit.*, §§506–521.

Under a system where tax law is governed by private law as a matter of principle, this situation is not too frequent, but it does happen, and it has to be resolved on a case-by-case basis, according to the interpretation of the applicable legal provision. For instance, the Court of Cassation has held that the concept of "business profits" used in the income tax legislation (see article 23(1) 1° of the ITC) is based "on an economic reality that is not necessarily subject to the classification of goods and rights set down in the Civil Code".[62] Another example can be found in a judgment by the Court of Cassation of 24 October 1975,[63] where the Court interpreted the expression "movable object" used in (what is now) article 90, 1°, of the ITC as covering only tangible goods.

6.2. Some private law requirement not fulfilled for the private law concept to apply

The consequence of the situation dealt with here depends on the nature of the private law requirement to be fulfilled.

Where the requirement has a bearing only on the enforceability of the transaction *vis-à-vis* third parties, it is not relevant for tax purposes because the tax authorities cannot rely on the legal protections that private law provides for third parties (see above, section 2); tax is to be assessed based on the legal situation of the taxpayer applying to himself. For instance, if A sells a piece of real estate to B, the transfer of ownership in the property will be effective for tax purposes as soon as it is effective under private law between A and B, although the sale will not be enforceable as against third parties until it has been registered at the Mortgage Register.[64]

Where the requirement waiting to be fulfilled is necessary for the legal existence of the transaction even as between the parties, tax law will, as a rule, follow the private law analysis.

6.3. Legal characterization of minor importance in private law relations and of importance in tax law

The question of the correct legal characterization of a transaction is often of no relevance in private law relations, except generally in the case of a bankruptcy.[65] This appears to be the case, for instance, with the question of whether it is the lessor or the lessee that is the owner of the asset under a financial lease that includes a low-price purchase option, or which party to a repo transaction is the owner of the securities.

62 Court of Cassation, 24 September 1968, *Pas.*, 1969, I, p. 92, at p. 98 (free translation from French original).

63 *Pas.*, 1976, I, p. 244.

64 Ghent Court of Appeal, 19 June 1997, summarized in *Fiscologue*, no. 623, 8 August 1997; see also Antwerp Court of Appeal, 18 September 1995, *FJF*, no. 95/200.

65 The private law concept of sham has itself been defined, in several of its aspects, in judgments handed down in tax cases (see the Court of Cassation cases cited above, section 5.1, and Van Ommeslaghe, *op. cit.*, in *Les obligations contractuelles*, p. 147).

The legal principle is clear: the tax treatment of the transaction has to be determined in the light of a correct analysis under private law, however difficult this analysis is.

Yet situations where the transaction is susceptible to two different legal characterizations under private law come under the general anti-abuse provision: the choice made by the parties between the two available characterizations can be set aside by the tax authorities if made solely for the avoidance of taxes (see section 5.3).

6.4. Treatment of foreign law concepts

The legal characterization of a transaction or other situation will be assessed for Belgian tax purposes on the basis of a legal characterization under foreign private law whenever applicable conflict of laws rules point towards the foreign law (section 5.6). This raises difficulties, not specific to tax law, where the applicable foreign law uses a legal concept that is unknown to domestic law. The common law institution of the trust is an obvious and well-known example. In the absence of any specific provision in tax law, a tax treatment has been proposed according to the case law, administrative rulings and, above all, legal scholarly works based on an analysis of the legal relationships between the settlor, the trustee, the beneficiary and the property placed in trust, and on a parallel with domestic legal situations.[66]

6.5. Relationship between state private law concepts and federal tax law

The General Reporter points out that, in federal states, the question arises whether a federal income tax rule could mean different things in different states because of differences in the private law concepts under the different state laws. This question has not arisen in Belgium yet because Belgium has been a federal state for a few years only and because the prime authority in the field of private law lies with the federal state. Conceivably, the question could arise in the future.

7. Relation of anti-avoidance rules to tax treaties

The provisions of double taxation treaties have precedence over domestic law. In a treaty situation, a domestic anti-abuse rule can therefore be applied only if it results in a tax assessment which does not violate the treaty.

[66] For a recent analysis of trusts under Belgian tax law, A. Haelterman, *Fiscale Transparantie*, 1992, pp. 306–334; R. Deblauwe, "Enkele beschouwingen over de trust en de Belgische belasting", *TFR*, 1987, pp. 77 *et seq*., and "Trust en inkomstenbelastingen", *TFR*, 1990, pp. 97 *et seq*.; A. Rombouts, "L'organisation patrimoniale internationale. Une analyse de l'utilité éventuelle de certaines institutions de droit étranger dans le cadre de l'organisation successorale", in *Le droit fiscal international belge et l'évitement de l'impôt*, Jeune Barreau Bruxelles, 1996, pp. 217–231;

A few Belgian treaties expressly authorize the application of the domestic provisions for the prevention of tax evasion and tax fraud.[67]

Under the other treaties, the question has to be analysed separately for each specific anti-avoidance provision. The outcome of that analysis will depend on the wording of the applicable domestic and treaty provisions and on the answer to the delicate and unresolved question of the relationship between tax treaties and anti-abuse provisions.

For instance, with regard to several "transfer pricing" anti-avoidance provisions (articles 26, 54 and 344(2) of the ITC), the tax authorities' view is that the domestic provisions are in total conformity with the treaties[68] whereas legal writers generally take a different view, at least for some aspects of those provisions.[69] As for the general anti-avoidance provision, most scholars tend to consider that it cannot be applied where it will change the way in which the treaty is applied.[70]

Résumé

En droit fiscal belge, la réalité juridique prévaut sur ce qu'il est parfois convenu d'appeler la "réalité économique", et ce en raison de deux principes fondamentaux: celui de la légalité de l'impôt et celui suivant lequel le droit fiscal est, sauf exception, régi par le droit privé.

La réalité juridique prévaut également sur la simple "forme" juridique d'un acte: ce n'est pas la convention apparente mais la convention réellement conclue par les parties qui est prise en considération. Le critère applicable à cet égard est le concept de simulation de droit privé: les parties ont-elles accepté toutes les conséquences juridiques de la convention qu'elles présentent à l'administration fiscale, ou existe-il une convention occulte par laquelle les parties ont convenu de modifier tout ou partie des conséquences juridiques de la convention apparente? Cette convention occulte ne doit pas nécessairement faire l'objet d'un écrit.

Le principe de la légalité de l'impôt, d'une part, et le principe suivant lequel le droit fiscal est gouverné par le droit privé, d'autre part, sont à la base de ce que l'on appelle la "liberté du choix de la voie la moins imposée", que la Cour de cassation a consacrée dans son arrêt en cause *Brepols* de 1961 et confirmé dans son arrêt *Au Vieux Saint-Martin* en 1990, condamnant ainsi tour à tour les théories de la fraude à la loi et de la "réalité économique". Sauf simulation au sens du droit privé, dont la preuve incombe à l'administration fiscale, un contribuable est donc libre de choisir la voie la moins imposée et donc efficace.

cont.

S. Nudelholc, "Modes d'utilisation de l'extranéité par les personnes physiques en vue d'alléger la charge des droits de succession", in *Les paradis fiscaux et l'évasion fiscale*, pp. 131–146 (on inheritance taxes only).

67 See the treaties with Austria (art. 27(4), 1°), Egypt (art. 28.2), Germany (protocol, §17) and Luxembourg (protocol, §10).

68 Practice note of 9 July 1999, p. 8; *Com. Conv.*, art. 9/5.

69 See C. Docclo, *op. cit.*, pp. 414–416, and the literature cited therein.

70 See Bernard Peeters, "De internrechtelijke ficties in het Belgisch fiscaal recht in het licht van het adagium '*Pacta sunt servanda*"', *Liber amicorum Maeckelbergh*, 1993, p. 355; E. Van der Bruggen, "Werken Belgische anti-ontwijkingsmaatregelen door in een verdragsituatie?", *TFR*, 1994, pp. 276–279. See also J. Malherbe, *op. cit.*, pp. 680–681. Cf. the nuances introduced by Faes, *op. cit.*, §§268–277.

Des dispositions spécifiques ont apporté de longue date certaines limites à la liberté du choix de la voie la moins imposée. Ces dispositions se sont multipliées dans les années quatre-vingts.

Une loi du 22 juillet 1993 a finalement introduit une disposition générale "anti-abus" dans le Code des impôts sur les revenus 1992 (article 344, §1er), disposition rapidement étendue aux droits d'enregistrement (article 18, 2°, du Code des droits d'enregistrement). Cette disposition vise à atteindre les qualifications juridiques choisies dans le but exclusif d'éviter un impôt. Elle s'applique uniquement aux actes juridiques (contrats, décisions de l'assemblée générale des actionnaires ou d'un autre organe d'une société, etc.) et est sans effet à l'égard des simples faits matériels ou des comportements consistant à s'abstenir de poser un acte juridique. Elle ne permet pas de faire abstraction des actes posés par le contribuable mais seulement, le cas échéant, de la qualification juridique qui leur a été donnée. Elle n'autorise pas davantage la taxation suivant une "réalité économique" indépendamment de l'analyse juridique. Suivant la majorité des auteurs, la disposition générale "anti-abus" permet à l'administration fiscale d'écarter la qualification juridique que les parties ont donnée à un acte juridique dans le but d'éviter l'impôt, mais elle ne dispense pas l'administration de l'obligation d'appliquer la loi fiscale sur la base d'une qualification juridique qui soit correcte en droit privé. En d'autres termes, l'administration fiscale peut faire usage de l'article 344, §1er, uniquement dans les cas où plusieurs qualifications juridiques sont possibles en droit privé. Cette condition ne sera que rarement satisfaite dans le cas d'un acte isolé. La disposition générale "anti-abus" sera essentiellement utile en présence de ce que l'article 344, §1er, appelle "des actes distincts réalisant une même opération". Ce concept suppose une série d'actes "conçus dès l'origine comme faisant partie d'une chaîne indivisible"; il est inspiré de la jurisprudence dite *Ramsay/Furniss* de la Chambre des Lords du Royaume-Uni. Face à une telle "opération", l'administration peut établir l'impôt sur la base d'une qualification juridique faisant abstraction de celle donnée aux différentes étapes intermédiaires.

Zusammenfassung

Generell hat nach belgischem Steuerrecht die rechtliche Realität Vorrang gegenüber dem, was als der "wirtschaftliche Inhalt" eines Vorgangs bezeichnet werden kann. Massgeblich hierfür sind zwei elementare Grundsätze, nämlich die "Rechtmässigkeit der Steuer" und das Prinzip, dass das Steuerrecht in der Regel vom Privatrecht bestimmt wird. Die rechtliche Realität hat auch Vorrang gegenüber der rechtlichen Form, denn es wird nur der echte, nicht aber der vorgebliche rechtliche Vorgang zwischen den Parteien berücksichtigt. Ausschlaggebendes Kriterium hierfür ist der privatrechtliche Begriff des Scheinvorgangs. Entscheidend ist, ob die Parteien alle rechtlichen Konsequenzen des den Steuerbehörden unterbreiteten Vertrags akzeptieren oder ob es daneben einen Geheimvertrag gibt, der einige oder alle rechtlichen Konsequenzen des offengelegten Vertrags ändert. Dieser Geheimvertrag braucht nicht schriftlich formuliert zu sein.

Das Prinzip der "Rechtmässigkeit der Steuer" einerseits und Grundsatz, dass das Privatrecht das Steuerrecht bestimmt, andererseits bilden die Grundlagen der sogenannten "freien Wahl des steuerlich am geringsten belasteten Weges", wie es das Kassationsgericht in seinem Urteil im Fall *Brepols* aus dem Jahr 1961 formulierte, und 1990 im Fall *Au Vieux Saint-Martin* bestätigte, wobei es gleichzeitig die Prinzipien des *fraus legis* und der "wirtschaftlichen Realität" aufgab. Grundsätzlich ist eine Steuervermeidung wirksam, es sei denn es liegt ein Scheinvorgang im Sinne des Privatrechts vor und die Steuerbehörden können dies beweisen.

Die “freie Wahl des steuerlich am geringsten belasteten Weges” wird seit langem durch gezielte Bestimmungen zur Bekämpfung von Steuerumgehungen, die nach und nach in die Steuergesetze aufgenommen wurden, immer stärker untermauert. In den späten achtziger Jahren wurden sie immer zahlreicher.

Ein Gesetz vom 22. Juli 1993 hat schliesslich eine allgemeine Bestimmung zur Bekämpfung von Steuerumgehungen in das Einkommensteuergesetz von 1992 (Artikel 344(1)) eingeführt, die sehr bald auf auf Eintragungsgebühren (Artikel 18(2) des Eintragungsgebührengesetzes) erweitert wurde. Die Bestimmung zielt auf rechtliche Konstruktionen ab, die ausschliesslich aus Steuervermeidungsgründen gewählt werden. Sie gilt nur für Rechtshandlungen (Verträge, Beschlüsse einer Aktionärshauptversammlung oder eines anderen Organs einer Kapitalgesellschaft usw.), nicht aber für blosse Tatbestände und die Unterlassung eines Rechtsgeschäftes. Sie ermächtigt die Steuerbehörden nicht, den Vorgang selbst für ungültig zu erklären, sondern nur die für ihn von den Parteien gewählte rechtliche Konstruktion. Sie ermächtigt die Steuerbehörden ebenso wenig, die Steuer auf der Grundlage irgendeiner “wirtschaftlichen Realität”, losgelöst von einer rechtlichen Analyse des Vorgangs, zu erheben. Nach Ansicht der meisten Fachleute ermöglicht es die allgemeine Bestimmung zur Bekämpfung von Steuerumgehungen den Steuerbehörden, die von den Parteien für ihren Rechtsvorgang gewählte rechtliche Konstruktion für ungültig zu erklären (wenn hiermit Steuervermeidungszwecke angestrebt wurden), befreit die Steuerbehörden jedoch nicht von ihrer Pflicht, die Steuergesetze auf der Grundlage einer privatrechtlich korrekten rechtlichen Konstruktion anzuwenden. In anderen Worten, die Steuerbehörden können Artikel 344(1) nur anwenden, wenn nach dem Privatrecht mehr als eine rechtliche Konstruktion möglich ist. Im Fall eines Einzelvorgangs dürfte diese Voraussetzung selten gegeben sein. Deshalb ist die Bestimmung zur Bekämpfung von Steuerumgehungen zweifellos in den Fällen am nützlichsten, bei denen es sich gemäss Artikel 344(1) um “getrennte Vorgänge mit dem gleichen Ergebnis” handelt. Demnach müssen “aufeinander folgende Vorgänge eine Reihe von Vorgängen bilden, die von Beginn an darauf angelegt waren, Teile einer zusammengehörenden Kette zu bilden”. Diese Auffassung stützt sich auf das sogenannte *Ramsay/Furniss*-Prinzip, des House of Lords in England. Werden die Behörden mit einem solchen “Vorgang” konfrontiert, können sie die Steuer auf der Grundlage einer rechtlichen Konstruktion erheben, die von jener der einzelnen Rechtshandlungen abweicht.

Resumen

En derecho tributario belga, la realidad jurídica prevalece sobre lo que se llama “sustancia económica”, y ello en razón de dos principios fundamentales: el de la legalidad fiscal y el de que el derecho fiscal se rige, salvo excepción, por el derecho privado.

La realidad jurídica prevalece también sobre la simple “forma” legal de un acto: no se considera el negocio simulado sino el realmente concluido por las partes. El criterio aplicable al respecto es el concepto de simulación del derecho civil: ¿han aceptado las partes todas las consecuencias jurídicas del negocio que presentan a la administración fiscal, o existe un negocio simulado, no necesariamente documentado, por el cual las partes han convenido modificar todo o parte de las consecuencias jurídicas del negocio disimulado?

Los dos principios anteriormente citados son la base de lo que se llama “la libertad de elección de la vía menos gravada”, que el Tribunal Supremo consagró en su resolución *Brepols* de 1961 y confirmó en la sentencia *Au Vieux Saint-Martin* de 1990, rechazando una tras otra las teorías de los actos en fraude de ley y de la “sustancia económica”. Así pues, salvo

simulación en el sentido del derecho privado, cuya prueba incumbe a la administración tributaria, el contribuyente es libre de optar por la vía menos gravada.

Desde hace tiempo, existían disposiciones específicas limitando la libertad de elección de la vía menos gravada. Estas disposiciones se han multiplicado en los años ochenta.

Por fin, una ley de 22 de julio de 1993 estableció una regla general antifraude en el Código fiscal sobre la renta 1992 (artículo 344(1)), inmediatamente ampliada a los derechos de inscripción (artículo 18(2) del Código de derechos de inscripción). Esta disposición pretende regular las calificaciones jurídicas a las que se ha optado con el único fin de eludir el impuesto. Se aplica únicamente a los actos jurídicos (contratos, decisiones de la junta general de accionistas u otro órgano de la sociedad, etc.), no a los simples hechos o actuaciones de una transacción legal. No permite hacer abstracción de los actos del contribuyente, sino sólo de la calificación jurídica que se les haya dado. Tampoco autoriza la imposición de la "sustancia económica" independiente del análisis jurídico. Según la doctrina mayoritaria, la norma general antifraude permite a la administración fiscal hacer abstracción de la calificación jurídica dada por las partes a un negocio jurídico con el fin de eludir el impuesto, pero no le dispensa de su obligación de aplicar la ley tributaria en base a la calificación jurídico-privada correcta. En otras palabras, la administración fiscal únicamente puede hacer uso del artículo 344(1) cuando existan varias posibles calificaciones jurídico-privadas, condición que raramente se presenta en un acto aislado. La norma general antifraude revela su eficacia en lo que el artículo 344(1) llama "actos distintos de una misma operación". Este concepto supone una serie de actos "concebidos desde su origen como parte de una cadena indivisible", y se inspira en la jurisprudencia *Ramsay/Furniss* de la Cámara de los Lores inglesa. En esta clase de "operación", la administración puede aplicar el gravamen a una determinada calificación jurídica, haciendo caso omiso de las dadas a las diferentes etapas intermedias.