

# EATLP 2015

## Surcharges and Penalties in Tax Law

### Belgium

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## Introduction

In Belgian law, each law must comply with the Constitution, the prominent legislative act under Belgian Law. Tax law and criminal law are governed by a number of “Codes” which generally govern a specified field of the Law.

Non-complying with a tax requirement could trigger different surcharges and penalties varying in accordance with the circumstances and the kind of infringement. “Surcharges” and “Penalties” applicable in the field of taxation are covered by provisions of tax law and criminal law. For the purpose of this paper, the authors therefore focus on the Belgian Income Tax Code of 1992 (“BITC”), the Belgian VAT Code (“BVATC”), the Belgian Criminal Code (“BCC”) and the Belgian Criminal Procedure Code (“BCPC”). These Codes include *quasi* all provisions governing surcharges and penalties in the fields of Income Taxation and Value added Taxation (“VAT”). In addition, all rules of common (civil) law, including any legal fictions contained therein, are applicable in tax law, unless the latter expressly, or due to its own principles, derogates from those rules<sup>4</sup>.

Under Belgian Law, “Surcharges” and “Penalties” applicable to tax law are multiple and polymorph. Those terms cover indeed i) criminal penalties ; ii) specific fiscal penalties (e.g. special levy on secret commissions ; surcharges for non-payment of advanced tax payments ; non-deductibility for non-disclosure of certain payment to tax havens) ; iii) administrative penalties (e.g. tax increases) ; and iv) interest (moratory interests and late payment interests).

Double taxation agreements and other supranational treaties (for example, the European Union (EU) treaty, the European Convention on Human Rights<sup>5</sup>, and the United Nations treaty) pre-empt Belgian domestic tax law, meaning that the latter must be interpreted in light of the former and does not apply when violating these international regulations.

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<sup>4</sup> Supreme Court, 9 July 1931, Pas., 1931, I, 213.

<sup>5</sup> Sepulchre, V., *Les droits de l'homme et les droits fondamentaux dans le droit fiscal belge : les évolutions des dernières années*, R.G.C.F. (2009), 524 ; Huybrechts, L., Malherbe, J. and al., *Fundamentele Rechten van de Belastingplichtige*, (Ced. Samsom, 1998).

In this paper the authors first discuss the national tax assessment procedure in the fields of income taxation and value added taxation (Chapter I). Second, they provide the reader with the definition, the category and the attributes of different types of surcharges at the level of the taxpayer (Chapter II). Third, they discuss the penalties that could apply to third parties that do not act in conformity with the law (Chapter III). Fourth, the legal protection offered to the taxpayer or the third party by Belgian tax law is analysed (Chapter IV). Fifth, the deductibility of specific surcharges is examined (Chapter V). As the authors have no knowledge about databases gathering information on the effectiveness of surcharges and penalties, this topic is not dealt with separately.

# Chapter I : Taxpayer and Third Party Duties

## 1.1. Income Taxation

### 1.1.1. Tax Returns and Forms

Under Belgian law, the starting document of a tax assessment in the field of income taxation is the tax return. As a rule, any taxpayer must disclose their income on a yearly basis ("taxable period") into the tax return of the year following the taxable period (the "tax year")<sup>6</sup>.

Any taxpayer subject to individual income tax must file tax returns on a yearly basis (except for categories of taxpayers relieved from filing obligations by Royal Decree)<sup>7</sup>. Filing must be completed within the period of time indicated on the tax return (in principle before June 30 of the relevant tax year). However, this period of time may not be less than one month from the date on which the tax return was sent to the taxpayer. A taxpayer who does not receive a tax return should request one from the tax authorities, at the latest by June 1 of the tax year.

Individual taxpayers must disclose in their tax returns existing i) bank accounts, ii) insurance contracts and iii) "legal entities or arrangements" held abroad<sup>8</sup>.

As regards individual taxpayers, interest and dividend income does not always have to be included in the annual tax return. As far as interest and dividends earned outside the exercise of a profession are concerned, this declaration generally only applies when no withholding tax has been deducted from such income. In other words, the payment of the withholding tax discharges the taxpayer's liability to pay any additional tax ("*précompte libératoire*" "*bevrijdende voorheffing*"). Income not subject to withholding tax must be included in the annual tax return and is taxed at a separate flat rate identical to the withholding tax rate. A taxpayer could, however, opt to include income subject to withholding tax in his/her tax return and, thus, aggregate it with other income items instead of having the income taxed at a flat rate<sup>9</sup>.

Any taxpayer subject to corporate income tax must file a tax return on a yearly basis<sup>10</sup>. Such tax return must be submitted within a period of time that cannot be inferior to a period of one month following the approval of the annual accounts, and superior to six months as from the date of the last day of the accounting year<sup>11</sup>.

Companies subject to Belgian corporate income tax or non-resident income tax must report in their income tax returns all payments made to persons established in a tax haven<sup>12</sup>. According to the tax authorities, the term "payment" is very broad and includes transfers of funds and assets<sup>13</sup>. The following countries are regarded as tax havens: countries that the OECD considers not to provide sufficient cooperation with respect to the international exchange of information; and countries that appear on a list (provided by a Royal Decree of 6 May 2010)<sup>14</sup> of jurisdictions in which no taxes or only low taxes (a nominal rate of less than 10%) are due. Transactions

<sup>6</sup> See for e.g.: income earned by an individual between January 1, 2012 and December 31, 2012 (taxable period) is to be reported into the tax return relating to tax year 2013.

<sup>7</sup> BITC, art. 305.

<sup>8</sup> BITC, art. 307, par. 2 and foll. ; The terms « legal entities or arrangements » include i) trusts and alike legal arrangements and ii) non-resident entities from a low-taxed jurisdiction.

<sup>9</sup> BITC, art. 313.

<sup>10</sup> BITC, art. 305.

<sup>11</sup> BITC, art. 310.

<sup>12</sup> BITC, art. 307, par. 1 and art. 198, 1°, equally applicable to Belgian establishments.

<sup>13</sup> Administrative Circular, AAF n° 13/2010 of November 30, 2010.

<sup>14</sup> Royal Decree of 6 May 2010, Belgian Gazette ("B.G.") May 12, 2010.

must be reported only if the total payments made during the taxable period total EUR 100,000 or more.

Commissions, rebates, fees and other similar expenses that constitute earned income are deductible if the identity of the beneficiary is disclosed in a special annex to the tax return. These expenses must be supported by individual fee slips and a comprehensive statement of all such expenses, which must be provided before June 30 of the year following the year in which they were paid<sup>15</sup>.

### **1.1.2. Tax Assessment Procedure**

Tax returns and taxes due could be subject to the assessment of the tax authorities. Based on the circumstances, two tax assessment procedures could be implemented: i) regular assessment of the tax return filed in time and ii) *ex officio* assessment.

#### **i) Regular assessment**

This procedure applies to complete tax returns that are respecting all legal formalities and are filed in time by the taxpayer.

In principle, filed tax returns are presumed to be accurate and sincere until proven otherwise<sup>16</sup>. The tax authorities therefore bear the burden of proof with respect to the fact that the tax they claim is effectively owed by the taxpayer (*actori incumbit probatio*). When the tax authorities consider the tax return inaccurate, the tax return may be rectified provided that the proof of the inaccuracy is supplied by the tax authorities. The proof can be established on the basis of the common legal means<sup>17</sup>, including the tax authorities' minutes of report and except the declaration under oath from the taxpayer<sup>18</sup>. Besides, the tax authorities could use special means of proof involving the taxpayer or a third party.

As a general rule, the tax return can be audited during the taxable period. Furthermore, the tax return can be audited by the tax authorities, "without notice", during the three years following the 1st of January of the tax year ("assessment period")<sup>19</sup>. In the presence of "evidence of fraud", provided that such evidence has been notified to the taxpayer, the assessment period could be increased by four years to an aggregate assessment period of seven years<sup>20</sup>.

#### **ii) *Ex officio* assessment**

This procedure applies to the following specific circumstances:

- Tax return not filed in time;
- Tax return that does not comply with legal formalities;
- Failure to respond to a request for information;
- Failure to respond to a notice of deficiency<sup>21</sup>.

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<sup>15</sup> BITC, art. 57, 1°.

<sup>16</sup> BITC, art. 339.

<sup>17</sup> Documentary evidence; Presumption ; Testimonials ; Admissions.

<sup>18</sup> BITC, art. 341.

<sup>19</sup> BITC, art. 333, 2°.

<sup>20</sup> BITC, art. 333, 3°. and art. 354, 2°.

<sup>21</sup> BITC, art. 351.

In this procedure, the burden of proof is reversed<sup>22</sup>. Hence, the tax authorities establish at its discretion the taxable basis and the amount of taxes due by the taxpayer. If the taxpayer does not accept such established taxes, he/she bears the burden of proof with respect to the fact that the tax they claim is effectively owed by the taxpayer.

In such procedure, the tax return can be audited by the tax authorities, “without notice”, during the three years following the 1st of January of the tax year (“assessment period”)<sup>23</sup>. In the presence of “evidence of fraud”, provided that such evidence has been notified to the taxpayer, the assessment period could be increased by four years to an aggregate assessment period of seven years<sup>24</sup>.

### **1.1.3. Duties of Taxpayers**

#### **1.1.3.1. Holding Period**

Any books and documents considered by the tax authorities as essential (to establish the taxpayer's taxable income) must be kept until the expiry of the seventh tax year following the taxable period<sup>25</sup>.

#### **1.1.3.2. Communication of Books and Documents**

Each taxpayer must, when requested by the tax authorities, communicate any books and documents essential to determine the amount of his/her taxable income<sup>26</sup>. Those documents include all the documentation that the tax auditor considers as relevant for the establishment of the taxable income. In principle, such communication may only be carried out without “displacement”. This term means that the assessment may only be carried out in the taxpayer's premises. The taxpayer might however accept to convey the requested documents to the tax authorities' office.

Since 10 July 2014, the tax authorities are authorised to hold essential documents to establish the taxable income of a taxpayer (or a third party)<sup>27</sup>. Regarding accounting books, only closed ones may be held by the tax authorities. If considered essential to establish the taxable income of the taxpayer (or a third party), a copy of data held on computer support may be requested by the tax authorities<sup>28</sup>. According to the tax authorities, this request must however remain exceptional<sup>29</sup>.

#### **1.1.3.3. Request for Information**

The tax authorities may request any useful oral or written information to the taxpayer in order to verify his/her fiscal position. The term “information” is understood in a broad sense and includes private information in so far as it is useful for the assessment of the taxpayer's fiscal position.

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<sup>22</sup> BITC, art. 352.

<sup>23</sup> BITC, art. 333, 2°.

<sup>24</sup> BITC, art. 333, 3° and art. 354, 2°.

<sup>25</sup> BITC, art. 315, 3°.

<sup>26</sup> BITC, art. 315.

<sup>27</sup> BITC, art. 315ter.

<sup>28</sup> BITC, art. 315 bis.

<sup>29</sup> Administrative Circular of 27 June 2014, AGfisc n° 26/2014, n° Ci.RH.831/633.817/E.T.126.407.

Within the framework of a written request for information, the taxpayer has a period of one month to provide the tax authorities with his/her answer. This period may be extended as per the taxpayer's request<sup>30</sup>.

#### **1.1.3.4. Right to access premises of the taxpayer**

The tax authorities, if holding a mandate, have the right to access, without prior notice, the taxpayer's professional premises at any time of the day. This right includes private premises which are presumably used for a professional activity. As regards inhabited private premises, visits must only be executed between 5 A.M. and 9 P.M. with the prior consent of a Judge of police<sup>31</sup>.

Such right aims at providing to the tax authorities an overview of the activity carried out by the taxpayer and, therefore, to assess whether such activity is correctly reported into the taxpayers' tax return. Any findings of the tax authorities during their visit could be written into a minute of report<sup>32</sup>.

Whether the tax authorities have an active<sup>33</sup> (such as the police) or a passive right of investigation is controversial. Recent judgements have however attributed to the tax authorities a genuine active right of investigation<sup>34</sup>.

#### **1.1.3.5. Payment receipt for particular professions**

Persons exercising a liberal profession, a mandate or an office, for each payment received in cash, by cheque or otherwise in exchange for his/her services, are in principle required to deliver a dated and signed receipt<sup>35</sup>.

In addition, these persons are required to hold a journal indicating on a daily basis their incomes and charges<sup>36</sup>.

#### **1.1.3.6. Reporting obligation**

Taxpayers must report (i) all fees, commissions, rebates and other remunerations paid during the calendar year that constitute professional income on behalf of the beneficiary, regardless of whether such income is taxable in Belgium or abroad, and (ii) all remunerations, pensions, annuities or allowances paid to (former) personnel members or their assignees, with the exception of social benefits that are exempt in the hands of the beneficiary<sup>37</sup>. Those payments must be reported (on so-called "fiches") in order to be tax deductible.

Furthermore, Failure to comply with this formality could result in a special levy called "secret commissions tax" amounting to 309% of the amount of the payments which have not been

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<sup>30</sup> BITC, art. 316.

<sup>31</sup> BITC, art. 319.

<sup>32</sup> BITC, art. 340.

<sup>33</sup> Supreme Court, 16 December 2003, Pas., 2032, n° 653 ; Civ. Antwerpen, 2 February 2014, F.J.F., n° 2014/163 ; Civ. Bruxelles, 17 January 2012, R.G. n° 2010/11335/A, [www.fiscalnet.be](http://www.fiscalnet.be) ; Van Brustem, E. and Stevenart Meeùs, F., *Etendue du contrôle judiciaire et visites domiciliaires en droit fiscal*, in *La réforme fiscale 2012*, p. 145 ( Anthemis 2012); Moris, M., *Procédure fiscale approfondie en matière d'impôts directs*, p. 183, (Anthemis 2014); Stevenart Meeùs, F., *Manuel de procédure fiscale*, p. 133 and foll.,(Anthemis 2011).

<sup>34</sup> Civ. Brussels, 17 January 2012, T.F.R., 2012, n° 417, p. 238; Civ. Bruges, 26 October 2011, T.F.R., 2012, n° 422, p.499; Civ. Antwerpen, 20 December 2013, *Fiscale Actualiteit*, 2014, n° 5, p. 4.

<sup>35</sup> BITC, art. 320, par. 1.

<sup>36</sup> BITC, art. 320, par. 2.

<sup>37</sup> BITC, art. 57.

reported on the relevant forms<sup>38</sup>. However, given the stiff character of this special levy, it has been recently decided that it would only be applied in exceptional cases<sup>39</sup>. Eventually, further a recent draft bill<sup>40</sup>, this levy would be limited to 103%. The rate would be further limited to 51,5% in some cases.

#### 1.1.4. Duties of third parties

##### 1.1.4.1. Request for information concerning a specific taxpayer

As a general rule, in order to assess taxes due by a taxpayer, the tax authorities may: i) request written attest from third parties; ii) request from a third party any information considered as essential for the establishment and the collection of the tax due ; iii) proceed to investigations involving third parties ; iv) proceed to hearings of third parties<sup>41</sup>.

For the purpose of this provision, the terms “third parties” are understood in a broad sense and cover all third parties that could provide any information on a specific taxpayer. This provision does not allow the tax authorities to proceed to a so-called “fishing expedition” but the identity of the assessed taxpayer must be specified to the third party<sup>42</sup>.

More specifically, Belgian tax law provides particular conditions for information requested to financial institutions (i.e. banks and insurance companies) about their clients. As a general rule, such financial institutions are not allowed to collect information in their books and documents in view of the taxation of their clients (“bank secrecy”)<sup>43</sup>. Said rule suffers several exceptions.

The first exception to the bank secrecy is findings from the tax authorities allowing them to presume the existence or the preparation of a mechanism of tax fraud<sup>44</sup>. The term “mechanism” excludes isolated operations<sup>45</sup>. In such context, the tax authorities are allowed to request information directly from the financial institutions. A request emanating from the tax authorities could only allow the tax authorities to establish the tax due by the taxpayer.

The second exception to bank secrecy concerns the situation in which the tax authorities contemplate to proceed to a “taxation based on indicia and evidence of a higher wealth (“indicial taxation”)<sup>46</sup>. Indicial taxation is a special mean of proof permitting the tax authorities to establish the taxes due on the basis of a balance of assets and liabilities demonstrating that the actual income of the taxpayer is more substantial than the taxable income based on the taxpayer’s tax return. Evidence in such procedure must be precise, concrete and verifiable.

Preliminary to any waiver of the bank secrecy, the tax authorities are required to direct a request for financial information to the taxpayer mentioning that, if he/she fails to convey an answer to the tax authorities, such information could be requested directly from the financial institutions as

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<sup>38</sup> BITC, art. 219.

<sup>39</sup> Administrative circular of 22 July 2013, AGFisc, n° 30/2013, [www.fisconetplus.be](http://www.fisconetplus.be).

<sup>40</sup> Draft Program Law of 28 November 2014, Doc. 54 0672/001, Chambre, art. 28-40, <http://www.dekamer.be/flwb/pdf/54/0672/54K0672001.pdf>.

<sup>41</sup> BITC, art. 322, 1°.

<sup>42</sup> Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit., p. 168.

<sup>43</sup> BITC, art. 318.

<sup>44</sup> BITC, art. 318, 2°.

<sup>45</sup> Afschrift, Th., *La levée du secret bancaire fiscal*, p. 53, (Larcier 2011).

<sup>46</sup> BITC, art. 322 and 341.

of the termination of a period of one month beginning at the moment of the communication of the request<sup>47</sup>.

In the framework of indicial taxation, elements constituting the basis of a presumption of tax fraud must be communicated to the taxpayer by mean of a request for information regarding his/her financial accounts. Only if the taxpayer fails to provide the tax authorities with an answer, such information could be requested directly to the financial institutions<sup>48</sup>.

Since 1 February 2014, Belgian financial institutions must communicate the identity (national register number), account numbers and contracts of their clients to a central contact point ("CCP") ("point de contact central"/"centraal contact punt") established within the National Bank of Belgium ("NBB")<sup>49</sup>. Any collected information is available, on demand, to the tax authorities in case of presumptions of tax fraud or when the authorities plan to resort an indicial taxation<sup>50</sup>. Such request is only made available to the tax director within the tax authorities and provided that some pre-conditions are completed. Unless the Treasury's rights are in peril, the tax collector must communicate by registered email to the taxpayer, simultaneously with the request for information directed to the financial institution, the elements justifying the presumption of a tax fraud or an indicial taxation<sup>51</sup>.

#### **1.1.4.2. Request for information concerning a group of taxpayers**

Based on article 323 of the BITC, the tax authorities may obtain from any taxpayer all information related to a group of taxpayers in his/her possession due to a direct or indirect link with his/her professional activity. This communication could concern a group of taxpayers without specifically concerning any member of this group.

#### **1.1.4.3. Administrations and public services**

Administrations and public services must cooperate with the tax authorities. On request of the tax authorities, administrations and public services must provide the former with information in their possession in order to establish and to collect taxes due by a taxpayer<sup>52</sup>.

Administrations and public services concerned by this obligation are: i) Administrations of the State; ii) Administration of the Regions; iii) Administrations of the Communities; iv) Administrations of the Municipalities; and v) Public establishments and services.

#### **1.1.4.4. Collective investment vehicles**

UCITS and other collective investment vehicles must disclose to the tax authorities the amounts, per category, paid or attributed to taxpayers<sup>53</sup>.

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<sup>47</sup> BITC, art. 316 and 322, 2°.

<sup>48</sup> BITC, art. 322, 2° and 341.

<sup>49</sup> Royal Decree of 17 July 2013, B.G., 26 July 2013.

<sup>50</sup> Moris, M., *Procédure fiscale approfondie en matière d'impôts directs*, op. cit., p. 189 and foll.

<sup>51</sup> Ibid., p. 198.

<sup>52</sup> BITC, art. 327 to 330.

<sup>53</sup> BITC, art. 321bis.

## 1.1.5. Tax Collection Procedure

### 1.1.5.1. Duties of Taxpayers

Any taxpayer is liable for the tax entered on the roll in his/her name. The roll is enforceable against any taxpayer<sup>54</sup>.

Any tax due by a taxpayer is claimable, in the proportion of their share in the deceased taxpayer's estate, in the hands of parties entitled to receive a share of his/her inheritance<sup>55</sup>.

The Treasury disposes of a legal mortgage claimable on all Belgian assets of a taxpayer for income taxes, withholding taxes, interest and additional costs collection<sup>56</sup>.

In addition, the Treasury disposes of a general privilege on the movable assets of a taxpayer for income taxes, withholding taxes, interest and additional costs of collection<sup>57</sup>.

The tax authorities may compensate the taxes due with any tax credit in favour of a taxpayer as well<sup>58</sup>.

### 1.1.5.2. Duties of Third Parties

#### 1.1.5.2.1. Withholding taxes

In the Belgian tax system, withholding taxes concern movable incomes and professional incomes. To each kind of income relates a kind of withholding tax.

##### i) Movable incomes<sup>59</sup>

In principle, the payment of movable incomes (mainly interests, royalties and dividends) to a Belgian taxpayer are subject to withholding taxes<sup>60</sup>. Those taxes are withheld by the Belgian debtor of the payment or, if the income come from a foreign country, by the first Belgian financial establishment<sup>61</sup>. In principle the tax must be withhold upon the income payment or attribution. In principle, the debtor must disclose and pay the tax withhold within the 15 days following said payment or attribution<sup>62</sup>.

##### ii) Professional incomes

Professional income are subject to the withholding of a tax called the professional withholding tax. As a rule, the following persons are required to withhold a professional withholding tax:

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<sup>54</sup> BITC, art. 393.

<sup>55</sup> BITC, art. 398.

<sup>56</sup> BITC, art. 425.

<sup>57</sup> BITC, art. 422.

<sup>58</sup> Royal Decree in execution of the BITC, art. 166, par. 2.

<sup>59</sup> On this subject, Smet, P., *Handboek roerende voorheffing*, (Biblio 2003).

<sup>60</sup> BITC, art. 269.

<sup>61</sup> BITC, art. 261 ; in particular cases, the beneficiary of the income (BITC, art. 262) or the last financial intermediary (BITC, art. 261, 2°bis) is required to withhold the tax.

<sup>62</sup> BITC, art. 412, 1° and Royal Decree in execution of the BITC, art. 85.

- taxpayers acting as debtor, depositary, mandatary or intermediary who pay paying or attribute professional incomes, pensions, annuities or allowances;
- taxpayers employing staff in Belgium which is paid with tips and percentages based on its service to the clients;
- taxpayers acting as debtor, depositary, mandatary or intermediary who pay or attribute incomes to artists or athletes;
- taxpayers mandated by members of an association or a company to represent them in tax field or, in absence of such mandate, each of said members solidary;
- notaries, bailiffs and other persons who are required to submit a specific transaction to registration duties;
- Curator or liquidator or similar actors in the framework of a bankruptcy;
- taxpayers acting as debtor, depositary, mandatary or intermediary who pay paying or attribute specific incomes, taxable in Belgium, to a beneficiary from a foreign country<sup>63</sup>.

#### 1.1.5.2.2. Miscellaneous

As provided for taxpayers, the roll is enforceable against specific third parties as well<sup>64</sup>.

These fiscally liable third parties are the following:

- Company's directors regarding the collection of the professional withholding taxes due by his/her company<sup>65</sup>;
- Former property owners of real estate for which their heirs are liable for the payment of the real property withholding taxes<sup>66</sup>;
- A contractor as regards certain tax debts<sup>67</sup>;
- Notaries who are required to inform the tax authorities of the alienation of real estate located in their territorial jurisdiction<sup>68</sup>;
- Assignees of assets composed of elements essential in the constitution of customers' relations<sup>69</sup>.

Furthermore, taxpayers' spouses or partners could be held liable for taxes due by a taxpayer<sup>70</sup>.

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<sup>63</sup> BITC, art. 270.

<sup>64</sup> BITC, art. 393, par. 2.

<sup>65</sup> BITC, art. 442quater.

<sup>66</sup> BITC, art. 395.

<sup>67</sup> BITC, art. 400 and foll.

<sup>68</sup> BITC, art. 433.

<sup>69</sup> BITC, art. 442bis.

<sup>70</sup> BITC, art. 393 and 394.

## 1.2. VAT

### 1.2.1. Tax returns and forms

Under Belgian law, the starting document of a tax assessment in the field of VAT is the tax return. Every taxable person carrying out transactions subject to Belgian VAT that entitle the taxable person to a VAT credit must register with the Belgian VAT authorities<sup>71</sup>.

Taxable persons that exclusively engage in VAT exempt activities (not giving right to a VAT credit) are required to register for VAT purposes to the extent they have to pay tax to the VAT authorities for services they receive from a supplier in another EU Member State under the B2B reverse charge mechanism<sup>72</sup>. Such VAT exempt taxable persons are also required to register for VAT purposes to the extent they supply services to a customer established in an EU Member State in which the services are not exempt and the customer is liable to pay VAT in connection with services supplied in that Member State under the B2B reverse charge mechanism<sup>73</sup>. This is normally the case when a Belgian lawyer (whose activities are exempt from Belgian VAT) supplies services to a taxable person in another Member State in which the services provided by the lawyer are subject to VAT and the customer is liable to pay VAT to the tax authorities of that Member State under the B2B reverse charge mechanism.

The VAT registration obligation also applies to non-taxable persons that carry out intra-EU acquisitions exceeding an amount of EUR 11,200. These persons may also opt to submit the acquisitions to Belgian VAT<sup>74</sup>.

As a general rule, taxable persons supplying goods or services (other than exempt supplies that do not give right to a credit) must deliver an invoice for each supply of goods or services not later than the fifth working day following the end of the month during which the VAT became due<sup>75</sup>. This rule is subject to a number of exceptions. An invoice is not compulsory when the goods or services are supplied to private persons for a nonprofessional use.

Taxable persons are required to file VAT returns in connection with transactions subject to the VAT Code that they have carried out or under which supplies were made to them. VAT returns must be filed on a monthly or quarterly basis. The VAT return relates to the previous period of one or three months.

A VAT return must be submitted on a monthly basis, but taxable persons whose annual turnover does not exceed EUR 1,000,000 may, generally, file tax returns on a quarterly basis. However, taxable persons who are, in principle, allowed to file VAT returns on a quarterly basis but who make VAT exempt intra-EU supplies of goods exceeding EUR 400,000 on an annual basis are required to file VAT returns on a monthly basis.

A VAT return must be filed at the latest on the 20<sup>th</sup> day of the month following the month or the quarter to which it relates. As a rule, the VAT due must also be paid on or before that date. Taxable persons filing quarterly VAT returns must make advance payments at the latest on the 20<sup>th</sup> day of the second and third month of each quarter<sup>76</sup>. The advance payment is equal to one-third of the tax due for the preceding quarter.

<sup>71</sup> EC Directive 2006/112, art. 213.

<sup>72</sup> BVATC, art. 50, par.1, 4° ; (EC Directive 2006/112, Art. 214, para. 1, (d)).

<sup>73</sup> BVATC, art. 50, par. 1, 5° ; (EC Directive 2006/112, Art. 214, para. 1, (e)).

<sup>74</sup> BVATC, art. 50, par. 1, 2°.

<sup>75</sup> BVATC, arts. 53, par. 2 and 54; Royal Decree No. 1 of 29 December 1992.

<sup>76</sup> BVATC, art. 53, par. 1, 3; Royal Decree No. 1 of 29 December 1992, art. 18.

In principle, taxable persons must also submit, on a monthly or quarterly basis, a statement listing the intra-EU supplies of goods which they make.

### **1.2.2. Tax Assessment Procedure**

The tax return and the taxes collected could be subject to assessment by the tax authorities.

The burden of proof of inaccuracies of such tax return rests on the tax authorities. When the tax authorities consider the reported tax liabilities inaccurate or when they presume the presence of a tax abuse, the tax return may be rectified provided that the proof of such inaccuracy is supplied by them. The proof may be established on the basis of the common legal means of evidence<sup>77</sup>, including the tax authorities' minutes of report and except the declaration under oath from the taxpayer<sup>78</sup>. Besides, the tax authorities may use special means of proof involving the taxpayer or a third party.

Differently from income taxation, there is no time limit for the tax authorities to assess the tax position of the taxpayer in the field of VAT<sup>79</sup>. However, the tax may only be recovered within a period of three years following the year of the occurrence of the taxable event. This period is extended to seven years in case of: i) information coming from a foreign country demonstrating that the taxpayer has infringed the law governing VAT; ii) a legal action demonstrating that the taxpayer has infringed the law governing VAT; iii) evidence coming to the attention of the tax authorities demonstrating that the taxpayer has infringed the law governing VAT when the taxpayer has acted with "fraudulent intent or the intent to cause damage"<sup>80</sup>.

The tax authorities dispose of similar powers in the tax assessment procedure and in the tax collection procedure<sup>81</sup>. The following sections (1.2.3. and 1.2.4.) are therefore applicable to the tax collection procedure.

### **1.2.3. Duties of Taxpayers**

#### **1.2.3.1. Holding Period**

Any person (i.e. not only the taxpayer) must hold during seven years as from the 1<sup>st</sup> of January of the year following the closing of the books or the establishment date of the documents, invoices, books and accounting documents, contracts, documentation relating to orders of supply of services and delivery of goods, documentation relating to the shipping of the goods, bank statements and other books relating to the taxpayer's activity<sup>82</sup>. The Supreme Court ruled that internal documents such as time-sheets may be requested by the tax authorities as well<sup>83</sup>.

#### **1.2.3.2. Communication of Books and Documents**

Any taxpayer must, as in the field of Income Taxation, when requested by the tax authorities, communicate any books, invoices and documents which they must keep to determine the exact

<sup>77</sup> BVATC, art. 59 ; Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit, p. 688 and foll. ; Documentary evidence; Presumptions; Testimonials; Admissions.

<sup>78</sup> BITC, art. 341.

<sup>79</sup> Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit., p. 660.

<sup>80</sup> BVATC, art. 81bis.

<sup>81</sup> BVATC, art. 63bis.

<sup>82</sup> BVATC, art. 60 ; Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit, p. 108, 660 and foll.

<sup>83</sup> Supreme Court 29 January 1988, F.J.F., 1988, 183, J.T., 1989, p. 62, Pas., 1988, I, p. 928, R.W., 1987-1988, p.1477.

amount of his/her tax liability or a third party's tax liability. In principle, such communication may only be carried out without « displacement ». This term means that the review of such documents may only be carried out in the taxpayer's premises. The taxpayer may however accept to convey the requested documents to the tax authorities' office<sup>84</sup>.

Invoices in a language that is different from one of the three national languages (Dutch/French/German), if necessary, must be translated in one of the national languages upon request of the tax authorities<sup>85</sup>.

A copy of data held by the taxpayer on computer support may be requested by the tax authorities subject to the delivery of a receipt to the taxpayer.

The tax authorities are allowed to hold invoices, books and documents useful to establish the tax liability of a taxpayer (or a third party)<sup>86</sup>. Regarding accounting books, even closed ones may be held by the tax authorities<sup>87</sup>.

#### **1.2.3.3. Request for information**

Based on article 62, par.1 of the BVATC, the tax authorities may obtain from any person (i.e. not only taxpayers) information in order to verify the exact amount of his/her tax liability or a third party's.

The scope of such request is broader than under a request of information in the field of income taxation (see above 1.1.4.1. and 1.1.4.2.).

Contrarily to the rule in income taxation, there is no "bank secrecy" in the field of VAT. The sole condition for the tax authorities to request information to a financial institution is that such request must come from a tax agent specifically mandated by the Minister of Finance<sup>88</sup>.

#### **1.2.3.4. Right to access premises of the taxpayer**

The tax authorities, if it holds a mandate, has the right to access, without prior notice, the professional premises of taxpayers exercising a professional activity at any time of the day. This right includes private premises which are presumably used for a professional activity. As regards inhabited private premises, visits may only take place between 5 A.M. and 9 P.M with the prior consent of a Judge of police<sup>89</sup>.

Such right aims at providing to the tax authorities an overview of the activity carried out by the taxpayer and, therefore, to assess whether such activity is correctly reflected into the taxpayer tax return. Any findings of the tax authorities during the visit may be written into minutes of a report<sup>90</sup>.

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<sup>84</sup> BVATC, art. 61, par. 1, 1°.

<sup>85</sup> BVATC, art. 61, par. 1, 1° to 4°.

<sup>86</sup> BVATC, art. 61, par. 2, 1°.

<sup>87</sup> BVATC, art. 61, par. 1, 1°.

<sup>88</sup> BVATC, art. 62bis.

<sup>89</sup> BVATC, art. 63.

<sup>90</sup> BITC, art. 340.

Based on a decision of the Supreme Court, it appears that the tax authorities have an active right of investigation (i.e. the right to search)<sup>91</sup>.

#### **1.2.3.5. Right to seize merchandises**

If during an investigation the representative of the tax authorities discovers merchandises that may be reasonably presumed to result from an infringement to VAT legal provisions, the representative is allowed to seize said merchandises. Any seizure must be followed by a notice of seizure conveyed to the taxpayer within the following 24 hours in writing. If the taxpayer provides the tax authorities with evidence of the origin, the quantity, the price or the value of the merchandises and the identity of the parties, the tax authorities order the release of the seizure<sup>92</sup>.

#### **1.2.4. Duties of Third Parties**

Given the broad terms of the provisions relating to the tax authorities' powers of investigation in the field of VAT, duties of third parties are similar to taxpayers' duties. We therefore redirect the reader to section 1.2.3. Besides, the Belgian VAT Code provides particular duties for specific third parties. Those specific third parties are the following: i) Notaries; ii) Financial establishments; iii) EU member States.

##### i) Notaries:

When in charge of the drawn up of a deed establishing any alienation or any pledge of mortgage on a real estate, the notary must assess whether the owner or the usufructuary is a taxpayer for VAT purposes or a member of a VAT unity. In the affirmative, the notary must inform the tax authorities. Should the notary lack to advise the tax authorities, he would be personally hold liable for the VAT to be paid and its accessories<sup>93</sup>.

If the Treasury's interest requires it, within the twelve days following the notary's advice, the tax authorities could notify to the notary the amount of VAT (and its accessories) due by the taxpayer<sup>94</sup>. Upon the recording of the deed, to the extent of the amount of taxes due, said notification triggers the attachment order ("saisie-arrest"/"derdenbeslag") of the sums and values held by the notary in execution of the deed. Subsequently, within the eight days following the recording, the notary is required to convey this amount to the tax authorities. If the sums and values that the notary has received upon the recording of the deed are inferior to the fiscal debt of the taxpayer, the notary must inform the tax authorities within the business day following the recording of the deed<sup>95</sup>.

##### ii) Financial establishments:

In order to grant specific types<sup>96</sup> of credit, loan or advance, any financial establishments must be provided with a fiscal attest from the taxpayer. Such attest comes from the TA and informs the financial establishment on the fiscal position of the taxpayer<sup>97</sup>.

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<sup>91</sup> Supreme Court, 16 December 2003, Pas., 2032, n° 653 ; Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit., p. 678.

<sup>92</sup> BVATC, art. 52bis, par. 1.

<sup>93</sup> BVATC , art. 93ter.,

<sup>94</sup> BVATC, at. 93quater.,

<sup>95</sup> BVATC , art. 93quinquies, par. 1.

<sup>96</sup> Credits, loans and advances that qualify for specific public subsidies in the framework of economic expansion policies.

iii) EU member States:

The tax authorities in charge of VAT could exchange with the other EU member States any sort of information that enable them to establish any taxpayer's VAT due. The tax authorities could use the information received from another EU member State in the same conditions as information they gather in Belgium<sup>98</sup>.

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<sup>97</sup> BVATC , art. 93duodecies,.  
<sup>98</sup> BVATC , art. 93terdecies,.

## Chapter 2: Definition and categorisation of surcharges at the level of the taxpayer

The Belgian tax system contains several measures aimed to ensure the compliance with tax duties. Although the standard tax procedure itself is surrounded with particularly sanctioning tax rules, such as non-deductibility of certain non-declared expenses<sup>99</sup>, an additional taxation of non-declared income<sup>100</sup>, a harder burden of proof for a taxpayer<sup>101</sup>, etc..., the Belgian Income Tax Code also provides for a separate chapter with criminal penalties, as well as administrative tax penalties<sup>102</sup>.

Besides these clear sanctions, some tax regimes also seem to react against undesired behaviour, although the reaction of the legislator cannot be considered to be a sanction as such. For instance, optional favourable tax measures are always submitted to certain formal and material conditions. When a taxpayer does not respect all the conditions he/she cannot enjoy the particular benefits. This exclusion is no sanction, but only a previous condition to be able to qualify for an advantage. However, sometimes the distinction between an exclusion of a tax favour and being submitted to surcharges or penalties is not very clear. E.g. when the Belgian legislator raised the tax on liquidation dividends<sup>103</sup> from 10 % towards 25 %, he introduced a temporary provision to offer taxpayers an option to avoid this tax raise for earlier reserved benefits<sup>104</sup>. Whereas, in case of the liquidation of a company, from 1 October 2014 the tax on liquidation dividends would raise up to 25 %<sup>105</sup>, companies and their shareholders could avoid this tax raise through a complex tax procedure leading to an anticipative payment of 10 % tax, due by the shareholder<sup>106</sup>. If these profits were reinvested in the company for a certain period of time<sup>107</sup>, without being redistributed as a dividend, this anticipative tax would be the final tax charged on this reserved income. Once this period being elapsed the redistribution of the income as a dividend could be tax free, while even earlier liquidations of the company would not trigger additional taxes on this part of income. If the income were redistributed as a dividend (via reduction of capital) during the waiting period an additional tax will be levied depending on the period of time already elapsed<sup>108</sup>. This additional tax can be considered to create a certain equalization with the tax on the mere distribution of dividends that would in any case have been 25 % and therefore does not qualify as a penalty or surcharge. However, as the tax rate reduces during the elapse of time, this proves already that it is not a mere loss of a benefit because of not fully respecting all conditions.

<sup>99</sup> See e.g., BITC, art.198, 10°.

<sup>100</sup> See e.g., BITC, art. 219.

<sup>101</sup> See e.g., BITC, art. 342, par. 3 and 352.

<sup>102</sup> BITC, art. 444 – 463. As far as the Flemish Region is concerned, most of these aspects are integrated in a separate Flemish Tax Code, the Vlaamse Codex Fiscaleit, under arts. 3.15 and 3.18.

<sup>103</sup> All income redistributed to its shareholders in case of liquidation of a company is considered as a dividend, except for the part that equalizes the shareholders part in the paid-up capital of the company. (BITC, art. 18, 2° ).

<sup>104</sup> BITC, art. 537.

<sup>105</sup> BITC, art. 171, 3° and 269, par. 1, 1°.

<sup>106</sup> For more details, see Galéa, G., *Le nouveau régime fiscal du boni de liquidation : compte à rebours*, R.G.F., 2014/2, p. 4-20.

<sup>107</sup> 4 of 8 years depending whether the company qualifies as a small company.

<sup>108</sup> An additional taxation of 15 % during the first 4 years after the reinvestment, 10 % - 5<sup>th</sup> and 6<sup>th</sup> year, and 5 % - 7<sup>th</sup> and 8<sup>th</sup> year (for small companies 15 % first two years, 10% - 3<sup>rd</sup> and 5 %-4<sup>th</sup> year).

In addition to this anticipative tax, the measure was completed with an additional tax at the level of the dividend distributing company. A company was not allowed to use this particular tax regime to diverge from its annual dividend policy of the last 5 years. If a company made use of this rule to distribute income at a 10 % tax rate, thereby reducing its general benefit distribution policy it applied for the last 5 years, the company would also suffer from a non-deductible additional surcharge of 15 % for the lesser amount of profits being distributed as a regular dividend. Technically this 15 % tax was a tax for the distributing company and not for its shareholders. It was calculated on a technical difference<sup>109</sup> and levied as an additional company tax. Nonetheless, from a general cumulative point of view there seems to be some analogy between distributing dividends at 25 % tax and distributing dividends under a favourable tax treatment of 10 % tax, raised with an additional company tax of 15 %<sup>110</sup>.

Both “corrective taxes” could be considered to be correctives for not fully qualifying for an advantageous tax measure. As they apply to companies and shareholders that fully respect the tax law, they should not be considered as penalties. However, if a company opted in 2013 for this particular regime, thereby not distributing “enough” regular dividends from its annual profits it would suffocate an additional 15 % tax. If subsequently, after e.g. two years, the reinvested dividends are already redistributed, this would also cause an additional tax of 15 %. The combined tax burden for a company and its shareholders that would have opted for an advantageous tax system, could then become more burdensome compared to the common tax burden on regular dividends! Nonetheless as no tax rule has been broken, there is no reason to sanction these taxpayers. At least, in this context it might become hard to distinguish between regular taxes and sanctions/surcharges.

Another famous example is the Belgian “fairness tax”<sup>111</sup>. As the name itself indicates, the legislator introduced this additional tax, because the previous situation was considered to be “unfair”. The tax is levied as an additional tax on the taxable income of a company that is economically able to distribute profits to its shareholders, but nonetheless is not taxed under the corporate tax regime. This effect is possible because it technically reduces its taxable profits throughout the use of legal tax favours, such as the notional interest deduction or the deduction of earlier losses. Although the company might perfectly administer all of its tax obligations, nonetheless the mere fact of being able to distribute profits, without supporting a corporate taxation, is considered to be “unfair”. This leads to an additional “surcharge”. Again, this is not a measure to ensure compliance with tax duties, but nonetheless interacts as an additional “surcharge”.

Although both mentioned tax measures do cause an additional surcharge, they are not meant to stimulate taxpayers to comply with their duties in order to secure tax assessment. This will be the criterion used for the further ongoing analysis. Only measures, particularly aimed at

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<sup>109</sup> A comparison between the usual percentage on profits being distributed as a regular dividend and the lesser amount of regular dividends for the year this favourable tax treatment has been used.

<sup>110</sup> A comparable new measure is planned to be installed for SME's. Whereas the mentioned regulation is only temporary to remediate the raise of liquidation taxes from 10 to 25 %, another favourable regime will last for the coming tax years. SME's will get a particular option to pay an additional tax of 10 % on their profits reserving them in a particular “liquidation-reserve”. (BITC, new art. 219quater). Distributions from this reserve will subsequently be submitted to a withholding tax of 5 or 15 %, depending on whether this distribution is only 5 years after creating the reserve or not. In case of liquidation of a company, the distribution will even be exempted. Combining all taxes, this also leads to an overall taxation of 15 %/25 % on distributed dividends.

<sup>111</sup> BITC, art. 219ter.

ensuring the compliance of a taxpayer or a third party with his tax duties will be further described.

As foreseen in the general questionnaire, these measures will be subdivided in criminal penalties, administrative tax penalties, interests and other surcharges. As the Belgian tax codes provide some general penalties equally applicable for taxpayers and possibly concerned third parties, they will immediately be analysed in this part. The following chapter will be dedicated to particular measures that only apply to third parties in order to ensure a correct tax assessment.

## 2.1. Criminal penalties

Belgian criminal law is regulated in separate Codes<sup>112</sup>. These codes describe the general criminal law procedure, as well as different offences and provide for sanctions. They can also be applied in a particular tax context. As such, capital benefits coming from tax offences can be confiscated<sup>113</sup>, money laundering and handling of stolen goods is also sanctioned in a tax context<sup>114</sup>,...

Besides these general criminal offences the Belgian tax codes contain some common criminal behaviours<sup>115</sup>, such as mere tax fraud<sup>116</sup>, forgery<sup>117</sup>, breaching the duty of professional confidentiality<sup>118</sup>, breaching the ban from a profession<sup>119</sup>. Some codes describe particular other criminal behaviours concerning also third parties, such as giving a false evidence<sup>120</sup> or refusing to give testimony<sup>121</sup>. Although these offences are listed in the Belgian tax code, they also largely adhere to the criminal law system: the prosecution is exercised by the Public Prosecutor<sup>122</sup> for a judge disposing over full judicial powers as determined in art. 6 ECHR, the general principles of the Belgian criminal code do apply<sup>123</sup> and the pronounced penalties are meant as punishments and multiplied by the same factor used to calculate fines in criminal cases<sup>124</sup>. Concerning these offences there is no discussion about the application of art. 6 ECHR.

Only the three most important offences, tax fraud, money laundering and forgery, will shortly be further explained hereunder.

### 2.1.1. Tax fraud

“Tax fraud” is the basic criminal offence, sanctioned with imprisonment from 8 days till two years and a fine from EUR 250 till EUR 500,000 or one of both sanctions. Tax fraud means each contravention of the regulations provided for in the tax code as well as its implementing orders and can consist in acting, as well as failing to act. Examples are not declaring taxable income at

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<sup>112</sup> The BCC and the BCPC.

<sup>113</sup> BCC, Art. 42 and further.

<sup>114</sup> Although art. 505 BCC requires in a tax context that the facts are committed within a context of “serious tax fraud”. This notion has been further illustrated in a Royal Decree of 3 June 2007 (B.G. 13 June 2007), but still lacks a clear undoubtful description.

<sup>115</sup> Nevertheless, each code only applies for its own particular tax regulations. Prosecution procedures have to take care to mention all relevant separate dispositions.

<sup>116</sup> a.o. BITC, art. 449, BVATC art. 73 and art. 3.15.3.0.1.

<sup>117</sup> a.o. BITC, art. 450, BVATC art. 73bis and Vlaamse Codex Fiscaliteit, art. 3.15.3.0.2.

<sup>118</sup> a.o. BITC, art. 453, BVATC art. 73octies and Vlaamse Codex Fiscaliteit, art. 3.15.3.0.5.

<sup>119</sup> a.o. BITC, art. 456, BVATC art. 73quater and Vlaamse Codex Fiscaliteit, art. 3.15.3.0.7.

<sup>120</sup> BITC, art. 451 and Vlaamse Codex Fiscaliteit, art. 3.15.3.0.3. This is not particularly sanctioned in the BVATC.

<sup>121</sup> BITC, art. 452 and Vlaamse Codex Fiscaliteit, art. 3.15.3.0.4.. This is not particularly sanctioned in the BVATC.

<sup>122</sup> BITC, art. 460, BVATC art. 74 BVATC and Vlaamse Codex Fiscaliteit, art. 3.15.1.0.1.

<sup>123</sup> BITC, art. 457, par. 1, BVATC art. 73quinquies, par. 1. The Vlaamse Codex Fiscaliteit does not explicitly refer to these principles, but some of the sanctions refer to the similar sanction in the Belgian Criminal Code.

<sup>124</sup> BITC, art. 457, par. 2 and BVATC art. 73quinquies par. 3. The Vlaamse Codex Fiscaliteit derogates from this principle and explicitly excludes the application of the criminal opdecimes in art. 3.15.3.0.8.

all<sup>125</sup>, not declaring the starting up of an economic activity although necessary for VAT purposes<sup>126</sup>, crediting previous losses of a company in disregard of a ban because of a change of control<sup>127</sup>, ... However, for these examples to be considered as “tax fraud”, the material fact of breaching an obligation is not enough. “Tax fraud” also demands for a particular moral sense: the acts need to be fulfilled with a “misleading intention”<sup>128</sup> or “the intention to damage”<sup>129</sup>.

When within this contravention one omits “serious tax fraud, whether or not in a particular organised way” the period of imprisonment is raised<sup>130</sup>, as this is seen as aggravating circumstances. The seriousness could be determined from the making or using of fraudulent documents, as well as the high amount of the transactions compared to the normal activities of a taxpayer<sup>131</sup>. Tax fraud should be considered to be “particularly organised” in case of several subsequent transactions, the intervention of one or more intermediaries and the use of complex settings or international procedures<sup>132</sup>. Those criteria are only indicative<sup>133</sup>. In absence of precisions by the law (except indicative criteria), the seriousness of a fraud would be determined on a case-by-case basis. Provided the little case law in this field<sup>134</sup>, this would inevitably leads to an important legal insecurity<sup>135</sup>.

## 2.1.2. Money laundering

A person commits a “money laundering” when buying, trading, receiving or managing goods that originate directly or indirectly from a crime, while this person knew, or must have known, the origin of these goods from the start of these actions. A person also commits a “money laundering” when a person converts or transfers these goods with the express purpose of concealing their illegal origins, while this person knew or had to know the origin of these goods from the start of his/her action or when a person assists others involved in such illegal activities<sup>136</sup>.

In Belgian law, this infringement is the subject of two statutes.

The statute of 11 January 1993<sup>137</sup> provides a preventive arm to the anti-money laundering Belgian legislation. This statute institutes obligations to disclose suspicious transactions for

<sup>125</sup> Court of Appeal Antwerpen, 19 October 1992, F.J.F. 1993, nr. 156. Although being a legal option, not declaring at all will rarely be prosecuted through criminal proceedings.

<sup>126</sup> BVATC, art. 53, par. 1, 1°.

<sup>127</sup> Court of First Instance Ghent, 28 March 2012, F.J.F. 2013, nr. 214.

<sup>128</sup> This has been interpreted as to provide for itself or a third party an illicit/unlawful advantage, which does not necessarily has to be a tax advantage but can also be something else. Cf. Supreme Court, 11 December 2012, and Supreme Court, 27 January 2010, R.W. 2011-2012, 607, note Wuyts, D..

<sup>129</sup> Although the most obvious damage would be for the common good, there is no difference between general and private interests. Damaging does not necessarily have to focus on the tax collector as such, but it suffices when one damages the rights or interests of a third party. Cf. Supreme Court, 14 February 2001, Pas. 2001, I, 91.

<sup>130</sup> The maximum period of imprisonment is raised up to two years.

<sup>131</sup> Parl. Doc., Chamber of representatives 2012-2013, n° 53-2756/001, pp. 60-61.

<sup>132</sup> Parl. Doc., Chamber of representatives 2012-2013, n° 53-2756/001, pp. 60-61.

<sup>133</sup> Report of 22 May 2013 for the Commission of Justice, Parl. Doc., Chambre, n° 53-2763/007, p. 7 and 8.

<sup>134</sup> a.o. Supreme Court, 29 September 2010, Pas., 2010, p. 2438.

<sup>135</sup> On this question, see a.o. Malherbe, P., *Blanchiment et fraude fiscale simple ou grave : un glissement malsain ?*, in C. Doclo (Ed.) et al., *Alabaster 1938-2013 IFA*, p. 567-587,(Anthemis, 2013) ; Scarna, S., *Blanchiment et fraude fiscale grave, organisée ou non*, R.G.C.F., 2014/1, p. 75-85.

<sup>136</sup> Belgian Criminal Code, art. 505.

<sup>137</sup> Law of 11 January 1993 on preventing use of the Financial system for purpose of money laundering and terrorist financing recently modified by the law of 18 January 2010 modifying the Law of 11 January 1993 on preventing use of the Financial system for purpose of money laundering and terrorist financing, B.G., 21 January 2010.

several intermediaries such as banks, insurance companies, investment companies, UCITS, real estate agents, notaries, bailiffs, lawyers, ...

The statute of 17 July 1990<sup>138</sup> has inserted a provision in the Belgian Criminal Code providing a repressive arm to the anti-money laundering Belgian legislation<sup>139</sup>. The offence of money-laundering is punished by an imprisonment of 15 days to 5 years and/or a fine amounting between EUR 26 and EUR 100,000. Besides, the objects and products of the/resulting from money laundering can be confiscated in the hands of the authors, co-authors or accomplices of this offence<sup>140</sup>. A tax fraud, serious or not, could be constitutive of money laundering. Consequently, it is subject of the criminal penalties applicable to this offense and objects or products of the tax fraud could be confiscated<sup>141</sup>.

### 2.1.3. Forgery

Although comparable to the common crime of “forgery”, in tax cases forgery has some peculiarities. Again the moral intention differs as the use of fraudulent documents especially requires the intention<sup>142</sup> to violate the tax regulations of the particular code. However, as far as accomplices are concerned, cooperation in the creation of fraudulent documents suffices, as long as they are assisting a taxpayer who aims to use these documents to violate general tax regulations.<sup>143</sup> Also the punishment itself is reduced in order to facilitate criminal prosecution<sup>144</sup>. The material aspects are rather comparable. The text requires the creation or use of an incorrect document, generally recognised as being correct, risking to cause damage for third (public or private) parties. These different aspects need to be further elucidated.

“Creation or use” implies a real activity from the person committing this crime. Whereas the Liege Court of Appeal limited the interpretation of this notion to the use of a document for the purpose it was created<sup>145</sup>, the Belgian Supreme Court enlarged it to each use of a fraudulent document giving effect to the mentioned irregularity<sup>146</sup>.

The “generally recognised document” is further described as a public, commercial or private document and can as well be a writing as an electronic document able to be materialised. It is important to notice that this document normally needs to be trusted on. For the common crime of forgery this general trust has been explained as a document on which the public authority or a private party usually trusts as representing the reality of what has been mentioned<sup>147</sup>. Particularly in a tax context however, the Supreme Court explicitly referred to a document made

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<sup>138</sup> B.G., 15 August 1990.

<sup>139</sup> BCC, art. 505.

<sup>140</sup> Bernard, D., Dejemepe, B. and Guillaume, C., *La confiscation pénale : une peine finalement pas si accessoire, questions spéciales en droit pénal*, p. 5-55, (Larcier 2011).

<sup>141</sup> Supreme Court, 22 October 2003, R.C.J.B., 2005, p. 83. ; Supreme Court, 8 November 2005, Pas., 2005, p. 2179.

<sup>142</sup> The mere intention is sufficient, even when because of an early discovery of the tax administration the desired result did not happen. Cf. Supreme Court, 24 April 2001, [www.cassonline.be](http://www.cassonline.be).

<sup>143</sup> Supreme Court, 28 June 2005, [www.cassonline.be](http://www.cassonline.be).

<sup>144</sup> In other criminal contexts, the punishment lies between 5 and 10 years of imprisonment, meaning that, for a prosecution for the criminal courts, one always first has to reduce the offence (called “correctionaliseren”/“correctionnalisation”), as this sanction is to be pronounced by a Supreme criminal Court. (Court of Assises). In tax cases, a difference is made between forgery to commit tax fraud (imprisonment of one month up to 5 year and a fine of EUR 250 up to EUR 500,000 or one of both punishments) and the mere creation or use of a fraudulent document (imprisonment of 8 days up to two years and a fine of EUR 250 up to EUR 500,000 or one of both punishments).

<sup>145</sup> Court of Appeal Liege, 27 April 2006, J.L.M.B. 2006, 1768 as cited by Thevissen, P., *Fraude fiscale in X., Postal Mémorialis.*

*Lexique du droit pénal et des lois spéciales*, [www.jura.be](http://www.jura.be).

<sup>146</sup> Supreme Court, 27 October 2009, [www.cassonline.be](http://www.cassonline.be).

<sup>147</sup> Supreme Court, 13 September 2005, [www.cassonline.be](http://www.cassonline.be).

for the purpose of misleading the tax administration within the calculation of the taxes due<sup>148</sup>. A mere tax declaration of income is only accepted under the condition of further verification by the tax authorities and can therefore not be recognized as such document. Although an incorrect declaration could qualify for the basic “tax fraud” offence, as such it cannot constitute forgery. The answers of a taxpayer on questions of the tax administration however, as well as reactions within the further tax procedure can constitute forgery.

The used document does not reflect the reality. This can be as well a material spuriousness, as an intellectual counterfeiting. Material corrections would alter the real values of certain transactions that took place, but under other conditions. In tax matters however most forgery concerns intellectual fraud. One describes in a document facts or actions that took not place (e.g. fictitious invoices or simulation).

## 2.2. Administrative tax penalties

Besides a criminal prosecution the different tax codes also contain administrative penalties. Whereas the criminal penalties are largely harmonised throughout all tax codes the several administrative tax penalties differ for each separate tax code. However, one common aspect forms the most obvious difference with the criminal penalties: the tax administration can autonomously apply these sanctions. As far as VAT and income taxes are concerned, three general categories of penalties can be distinguished.

The most important sanction is the increment of the taxes due with a proportional penalty.

As concerns income taxes, in case no declaration of income has been submitted at all, or an incomplete or wrong declaration has been filed, within any of the different procedures for levying income taxes<sup>149</sup>, the taxes due can be raised with an incremental penalty from 10 up to 200 %, according to a previously determined scale<sup>150</sup>. These scales make a difference according to whether the mistake in the declaration was outside the taxpayers competence (no tax increase), whether the mistake was in good faith (subsequently 10, 20 and 30 %, and the fourth time it is considered to be intentionally), whether the mistake was done intentionally to avoid taxes due (subsequently 50, 100 and 200 %) or whether the taxpayer made use of fraudulent documents (immediately 200 %)<sup>151</sup>. The increase will only be applied when the non-declared income reaches at least EUR 2,500, while the administrative penalty combined with the regular taxes due can never exceed the non-declared taxable income<sup>152</sup>.

Besides this legal corrections, the administration still can correct the percentages in view of the concrete circumstances. E.g. although in case of intentionally avoiding taxes a minimum increase of 50 % is foreseen, the tax administration can reduce this to 20 % because of a good

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<sup>148</sup> Supreme Court, 3 June 2009 and 21 May 2008, [www.cassonline.be](http://www.cassonline.be).

<sup>149</sup> This could be personal income taxes, corporate income taxes, legal person income taxes, non-resident income taxes but also declarations for any kind of withholding taxes.

<sup>150</sup> Royal Decree, art. 225 – 229 in execution of the BITC.

<sup>151</sup> As concerns withholding taxes, separate increments are foreseen in art. 228 of the Royal Decree. In case of mistakes outside the responsibility of the third party having to withhold (no increase), non-intentional mistakes (subsequently 0%, 10 %, 20 and 30 % (4<sup>th</sup> and the 5<sup>th</sup> time)), intentional wrong declarations (subsequently 50%, 75 % (2<sup>nd</sup> and 3<sup>rd</sup> time), 100 % (4<sup>th</sup> and 5<sup>th</sup> time), 150 % (6<sup>th</sup> and 7<sup>th</sup> time) and 200 %).

<sup>152</sup> BITC, art. 444.

cooperation of the taxpayer during the further tax process. This however does not mean that the initial non-declaring necessarily was unintentionally<sup>153</sup>.

The increase was during a long time calculated on the additional taxes due. If, because of crediting withholding taxes, advance payments, etc. ...no additional tax was due, there could not be an increase either. From tax year 2013 however, the increase is calculated on the taxes due, before crediting with advance payments, withholding taxes or any other tax credit.

The Belgian Code on value added taxes also provides for a penalty linked to the taxes due. Different breaches of the VAT legislation can be punished with a proportional fine of mostly twice the evaded taxes. In contrast with the BITC however, several infringements are separately mentioned, whereby the penalty is sometimes set to an additional minimum of EUR 50<sup>154</sup>, sometimes due by different persons severally or even each individually, and sometimes as a residuary option.

The first infringement is described as "not fulfilling the VAT due"<sup>155</sup>, while art. 70, par.2 CVAT sanctions working with incorrect invoices. In both cases the penalty of twice the evaded taxes has to be paid individually by each person that can be held responsible<sup>156</sup>. In cases of import<sup>157</sup> and export<sup>158</sup> however, the penalty (of again twice the evaded taxes) is a several responsibility of all concerned parties.

Art. 70, par.1bis CVAT further sanctions everybody having unlawfully deducted VAT with the double of the unlawfully deducted VAT, in case this has not already been punished under the previous sanctions. A particular sanction is finally foreseen in case an expert had to be appointed to determine the value of goods or services: the fine equals the difference in tax due in case the difference reaches at least 1/8 of the declared (and taxed) base<sup>159</sup>.

As in case of income taxes, also for VAT these proportional sanctions have been submitted to an additional scale of reductions for each different kind of offence<sup>160</sup>. If a taxpayer spontaneously corrects its taxes, no sanctions apply<sup>161</sup>, while if tax debts have to be claimed with a distress warrant, the (reduced) fines will be raised with 50 %<sup>162</sup>. Further it can be noticed that differences exist for all kinds of violations, but instead of repetition of violations, the

<sup>153</sup> Supreme Court, 18 October 2007. In case of intentionally evaded taxes, the tax administration had a particular period of 5 year to demand the payment of the taxes. However, in case of good faith, this period would be reduced to 3 years. As the administration only demanded an increase of 20 % on evaded taxes, the taxpayers concluded that the tax evasion was, according to the tax administration, unintentional. As more than three years were already passed, they considered the claim of the tax administration prescribed. This was not accepted by the Supreme Court. Even in case of intentionally evaded taxes, the tax administration can lower the tax increase from the provided scale of 50 %.

<sup>154</sup> BVATC, art. 70, par. 2; par. 3 and art. 71 B

<sup>155</sup> BVATC, art 70, par. 1.

<sup>156</sup> In case of not supported taxes: each person that could be held responsible; in case of incorrect invoices: the supplier as well as its counterparty.

<sup>157</sup> BVATC, art.. 70, par. 3 sanctions the use of documents with incorrect indications of the imported goods or the person liable for the import taxes. The fine is the double of the taxes due because of the import.

<sup>158</sup> BVATC, art. 71 sanctions situations where in case of export the value or the quantity of the exported goods is exaggerated, in which case the fine amounts to the double of the VAT that would have to be supported in case the exaggerated part had been delivered in Belgium and be submitted to VAT. Besides, it also sanctions the use of documents that incorrectly mention certain goods. In the latter case, the fine is the double of the VAT to be supported for this goods (based on their normal value) in case of a domestic delivery.

<sup>159</sup> BVATC , art. 70, par. 5.

<sup>160</sup> Cf. BVATC, art. 84 *in* Royal Decree n° 41.

<sup>161</sup> Royal Decree nr. 41, art. 3.

<sup>162</sup> Royal Decree nr. 41, art. 2.

proportional sanction primarily depends on the amount of taxes due and raises in case of higher avoided taxes.

Besides proportional increases, both tax systems also provide for a flat penalty.

Art. 445 BITC leaves the administration the option to sanction “*each violation of the provisions of the Income Tax Code as well as its executory decrees*” with a fine from EUR 50 up to EUR 1,250. The demand of this payment will be collected in line with the procedure for the personal taxes or withholding taxes<sup>163</sup>. It may be clear that this description is rather general and vague. Therefore the administration clarified the scope of application in its commentaries.<sup>164</sup> The essential purpose of this penalty is to ensure cooperation of taxpayers and third parties within the tax procedures, under the risk of an additional penalty, in case a proportional penalty cannot be asked or would be too low<sup>165</sup>. As this is a totally different reasoning as the (already explained) proportional sanction, according to the administration both sanctions can perfectly be combined.<sup>166</sup> Following the same logic, the Court of Appeal of Brussels concluded that a refusal to cooperate could not be sanctioned in case of illegal administrative demands<sup>167</sup>. As for the proportional penalties, these fines also progressively increase from EUR 0 till EUR 1,250, according to determined scales depending on the repetition of the facts and the faith of the taxpayer<sup>168</sup>.

As concerns VAT a similar administrative possibility exists. The administration can sanction violations with a flat tax fine from EUR 50 up to EUR 500.<sup>169</sup> Again a more detailed survey and scale has been developed, based on the type of violation, good or bad faith of the taxpayer, ...<sup>170</sup> And again, this scale is not binding on the administration who can still lower the provided sanctions<sup>171</sup>. However, in contrast to the direct income taxes, this sanction explicitly only applies to violations of the Tax Code and its executive decrees, other than the ones sanctioned with a proportional penalty.

A last particular option exists in direct income taxes, whereby the Minister of Finance by ministerial Decree can forbid somebody to act as a representative for other taxpayers during a period of maximum 5 years<sup>172</sup>. The persons aimed at are not particularly mentioned, but persons submitted to a particular professional discipline, or legal representatives are explicitly excluded. The text neither defines which infractions could cause this sanction. Answering a parliamentary question in 2004<sup>173</sup>, the Minister of Finance mentioned that this sanction had only

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<sup>163</sup> BITC, art. 445, par. 3 and 4.

<sup>164</sup> Administrative commentary on art. 445, nr. 2 and further.

<sup>165</sup> The repeated non-declaration of income could even be considered as a proof of bad faith. Cf. Court of Appeal Brussels, 26 October 2010.

<sup>166</sup> Administrative commentary on art. 445, nr. 6, as confirmed by the Courts of Appeal of Antwerp, 8 May 2001, A.F.T. 2001,438 and Brussels, 21 June 2001.

<sup>167</sup> Court of Appeal of Brussels, 14 June 2007, F.J.F., 2008, nr. 283. A taxpayer refused to show his ID, as the tax officer had no right to demand this. Therefore, the penalty demanded by the tax administration had to be considered illegal.

<sup>168</sup> Royal Decree in execution of the BITC, art. 229/1 and further.

<sup>169</sup> BVATC, art. 70, par.4.

<sup>170</sup> Royal Decree nr. 44.

<sup>171</sup> Court of first instance Antwerp, 28 March 2001, F.J.F. 2001, nr. 267. (Even in case of repetition and bad faith, the sanction can be reduced.)

<sup>172</sup> BITC, art. 446 - 448.

<sup>173</sup> Van Der Maele, D., Question nr. 480 of 20 September 2004, *Questions and answers House of Representatives 2004-2005*, p. 8522.

been applied one time via a Ministerial decree of February 9, 1990<sup>174</sup>. This sanction therefore is not a very important tool for the tax administration.

### 2.3. Interests

As the questionnaire already mentions, interests can be due by a taxpayer, as well as by the tax administration. They are not as such qualified as a penalty, but merely a compensation for liquidity losses due to late payment<sup>175</sup>. Income taxes and VAT both have their own distinctive regulations concerning the calculation of interests due.

However, before dealing with both distinctive regimes, a particular regulation can be mentioned. The Belgian tax administration has the possibility to compensate its own debts with all debts a taxpayer still has to fulfil, for as far as they are not disputed<sup>176</sup>. This compensation applies for all claims under the responsibility of the Federal tax administration and therefore also combines VAT and income taxes. No particular procedure, nor obligation is foreseen. Whereas in earlier judgments both the Supreme Court<sup>177</sup> and the Constitutional Court<sup>178</sup> considered that this compensation was limited to debts existing before a concurrence of creditors had arisen, a recent judgement<sup>179</sup> even seems to allow this compensation to a broader extent: even debts originating after a concurrence of creditors can be used to compensate tax debts. As Belgian income taxes are concerned, a similar compensation facility exists within the procedure for claiming the income taxes due.<sup>180</sup> However, this regulation contains an additional tool in case tax debts are disputed: compensation is still possible, but as a conservatory attachment. The exact implications remain however a bit unclear<sup>181</sup>. A similar procedure exists for VAT purposes<sup>182</sup>. Again for disputed tax debts the compensating claim could be held as a conservatory measure. However, in this case judicial powers are strongly limited having caused already several legal disputes<sup>183</sup>.

In case existing debts concerning income taxes are not settled within the time of payment interests have to be paid. The income tax code provides for interests at the legal rate calculated in months rounded down to the nearest EUR 10<sup>184</sup>. The calculation usually starts from the month after the one during which the time of payment has expired, each started month counting as a completed one<sup>185</sup>. However a distinction is made between late payment interest (interest on

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<sup>174</sup> B.G., 15 October 1994.

<sup>175</sup> Therefore, in case a payment would be tax deductible, the interests on this payment are also deductible. The rejection to deduct fines and punishments from taxable income (BITC, art. 53, 6°) does not apply. Cf. e.g. Preliminary Decision nr. 2012.414 of 27 November 2012. (Interests levied on the obligation to pay back irregularly received state aid is tax deductible.)

<sup>176</sup> Law of 27 December 2004, art. 334, B.G., December 31, 2004.

<sup>177</sup> Supreme Court, 24 June 2010, *Fisc. Act.* 2010, nr. 38, 8.

<sup>178</sup> Constitutional Court, 19 March 2009.

<sup>179</sup> Supreme Court, 31 March 2014.

<sup>180</sup> Royal Decree in execution of the BITC, art. 166.

<sup>181</sup> The Supreme Court accepts this could still be used as compensation, without having to fulfil the conditions that apply under common law (namely a sense of urgency and an indisputable debt). However, a judge can release the debts due by the Belgian State in case it considers the (compensating) tax claim to be clearly rightfully under dispute. Cf. Supreme Court, 12 December 2008, T.F.R. 2009, nr. 365, 636.

<sup>182</sup> 3 Royal Decree nr. 4 in execution of the BVATC, art. 76, art. 8.

<sup>183</sup> Cf. Tiborghien, A., *Handboek voor fiscaal recht*, (Kluwer 2011), 1320 with further references.

<sup>184</sup> BITC, art. 414 and following .

<sup>185</sup> BITC, art. 414 and 418.

debts of a taxpayer) and moratorium interest (debts due by the Belgian State), as for the latter the month in which the debt is settled, is not taken into account<sup>186</sup>.

Some particular corrections exclude the calculation of interests. As concerns late payment interests no interest is due under EUR 5 a month<sup>187</sup>. In case of disputed tax claims an administrative procedure has to be passed through before one can claim for the courts. However, if the tax administration does not react within a delay of 6 months, interests on the disputed part of the tax debt stop running as long as no decision is taken<sup>188</sup>. As concerns moratorium interest, again an interest under EUR 5 a month is not taken into account<sup>189</sup>. Besides in some particular situations interest is also excluded<sup>190</sup>.

Finally, for some late payment interests a different starting point is foreseen depending on particular circumstances. As a first exception, in case of tax claims enrolled after the normal legal delay (June 30 of the year following the tax year), interests are running as from July 1. This is because taxes are supposed to be enrolled in delay because the taxpayer did not declare this income<sup>191</sup>. A second exception focuses on particular tax favours. As such taxable income is sometimes temporarily exempted under the condition of reinvestment within a certain period of time. If, at the expiry of this delay the reinvestment has not been realised, the income will be taxable in the subsequent tax year, but with an interest calculated as from the tax year in which the income should have been taxed in case no tax favour applied<sup>192</sup>.

In VAT the starting point for the calculation of interest is the Belgian common civil law<sup>193</sup>. However thereupon some further exceptions are foreseen for late payments<sup>194</sup>, as well as late reimbursements<sup>195</sup>. In these cases interest is due at an interest rate of 0.8 % a month, rounded down to the nearest EUR 10 and not due when below EUR 2.50 a month. Each started month in delay of payment has to be taken into account.

Besides a particular exception is provided for VAT on immovable property or construction works, as art. 36 CVAT provides for a minimum taxable amount based on the normal value of the goods or services delivered. If after a claim of the tax administration an expert hearing during the trial proves out that the taxable amount was set too low, interest is due as from the start of this procedure, calculated according to the particular rules mentioned above<sup>196</sup>.

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<sup>186</sup> BITC, art. 418, 2<sup>nd</sup> ind .

<sup>187</sup> BITC, art. 414, par. 1, 4th ind.

<sup>188</sup> BITC, art. 414, par. 2.

<sup>189</sup> BITC, art. 419, 1°.

<sup>190</sup> Repayment because of acquitted/reduced debts, as well as some cases of repayment because of too much withholding taxes or advance payments. Cf. BITC, art. 419.

<sup>191</sup> BITC, art. 415. Given the reasoning, one immediately understands the exceptions provided when taxes are claimed at a later time because of other particular reasons the taxpayer cannot be blamed for.

<sup>192</sup> BITC, art. 416 However, some tax planning opportunities exist in this case. The interest is only due in case of total expiry of the provided period, which means that no interest will be due if a taxpayer deliberately decides to submit this income to tax before the reinvestment period (3 or 5 years) has ended. Besides, the interest is calculated on the taxes due in the year of expiry, for the proportional part of the taxes that can be attributed to the previously exempted income. If, because of e.g. losses, no tax is due, there will also no interest be calculated. Both favours were explicitly confirmed by the Belgian Minister of Finance. Cf. Oral Question n° 21709 Luk Van Biesen, 29 January 2014, Kamercomm. Financiën, Criv 53 Com 910, 26.

<sup>193</sup> BVATC, art. 91, par. 4.

<sup>194</sup> BVATC, art. 91, par. 1.

<sup>195</sup> BVATC, art. 91, par. 3.

<sup>196</sup> BVATC, art. 91, par. 2.

When collecting taxes, the tax administration can participate in several procedures focusing on debtors with financial difficulties<sup>197</sup>. The administration can let off parts of tax debts, as well as interests, increases and penalties. Especially concerning interests however, for income taxes<sup>198</sup>, as well as for VAT<sup>199</sup>, the tax collector himself can liberate, under special circumstances he can determine, a taxpayer from all or part of the interests levied on his tax debts<sup>200</sup>. The exercise of this corrective measure is a discretionary power of the tax administration and cannot as such be challenged in front of the tax courts. Courts can only verify whether there was no breach of law, nor abuse of power<sup>201</sup>.

## 2.4. Other surcharges

To ensure a correct tax compliance the Belgian income tax code also provides some notification regimes depending on the category of income. Particular items of income do not only have to be declared in an annual tax declaration, but additional declarations are foreseen to ensure an effective tax control. Some of these procedural matters are briefly described hereafter. Resident persons submitted to personal income tax have to declare in particular whether they<sup>202</sup> have foreign bank accounts<sup>203</sup>, whether they have taken a foreign life insurance<sup>204</sup>, and whether they participate in a Belgian or foreign “juridical construction”<sup>205</sup>. Although there are no particular taxes linked to this aspects, the declaration itself notifies the tax administration about possible income. Besides it can be mentioned that the Belgian legislator plans to add a particular tax on foreign juridical constructions. The most important declarations however concern expenses made. The deduction depends on a regular declaration and non-declaration risks to cause an additional tax. As these items however concern another taxpayer's income, these measures are being explained in the next chapter.

Besides, a short mentioning of the technique to recover taxes can also be mentioned. In order to ensure the collection of income taxes, the Belgian income tax regime largely applies advance tax payments<sup>206</sup>. Wherever possible, taxes are recovered by way of withholding taxes, retained from the distributed income by the debtor and immediately paid into the Treasury. However, also for other kinds of taxable income<sup>207</sup> a tax recovery system of advanced payments is being

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<sup>197</sup> Particular regimes exist in the law for the continuity of enterprises, the bankruptcy law, the law for the collective settling of debts, a regime for unlimited postponement of the collection of taxes, ...

<sup>198</sup> BITC, art. 417.

<sup>199</sup> BVATC, art. 84bis.

<sup>200</sup> Initially, this regime was installed for tax collectors offering a delay to pay taxes to a taxpayer with financial difficulties. The delay would automatically raise the tax debt and therefore not be helpful. However, as the text in both legal regimes is very general, the measure as such has not always to be used as an accessory for a granted delay in the payment of taxes.

<sup>201</sup> Court of Appeal, Ghent, 11 March 2014, *Fisco*, 2014, n° 1404, 12.

<sup>202</sup> Declarations apply for the person himself, his/her husband/wife, as well as children whose income the taxpayer is entitled to.

<sup>203</sup> BITC art. 307, par. 1, 2-3 part. The possession has to be declared in the annual tax declaration, while the account numbers have to be declared to a central administration.

<sup>204</sup> BITC art. 307, par. 1, 4th part.

<sup>205</sup> BITC art. 307, par. 1, 5th part. This is defined as a particular legal structure meant to separate part of an income to be managed for the account of the taxpayer, although in a strict sense not being part of his personal fortune any longer, e.g. a trust.

<sup>206</sup> BITC art. 1, par. 2.

<sup>207</sup> This regime applies more specifically for profits of a personal business, income salary of a director of a company, as well as the profits of a company.

stimulated through a technique of tax increases in case the tax debt has not been fulfilled through advanced payments<sup>208</sup>.

## 2.5. Una Via

Criminal law and fiscal law are coexisting into Belgian law. The link between those fields of the law is so tenuous that they often interfere each other. This is particularly true considering that some tax surcharges and penalties<sup>209</sup> constitute a criminal penalty on the basis of article 6 ECHR<sup>210</sup>. Such interferences could lead to dramatic consequences such as offenses suffering multiple criminal penalties<sup>211</sup>, taxpayers self-incriminating themselves while risking a tax penalty that has a criminal character or an absence of sanctions for a major fiscal offense such as VAT Carrousel due to the congestion of the courts<sup>212</sup>. It was therefore necessary to demarcate more clearly those two fields of the law. Such demarcation has been – partially – realized through the introduction of the *ne bis in idem* principle into Belgian law.

In its general legal meaning, the *ne bis in idem* principle provides that no legal action - resulting in the application of a criminal penalty - can be instituted twice for the same cause of action<sup>213</sup>. The statute of 20 September 2012 ("the law"), has introduced this principle into Belgian tax law, more precisely in the fields of income taxation and value added taxation<sup>214</sup>. The law aims at providing a unique procedural treatment to a fiscal litigation in order to avoid the addition of multiple criminal penalty (in the sense of art. 6 ECHR). Any fiscal offense could be criminally sanctioned either in application of the administrative procedure, or in application of the criminal procedure.

The law provides the Public Prosecutor and the tax authorities with new competences and prerogatives.

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<sup>208</sup> BITC art. 157 – 168 and BITC, art. 218. The calculation is based on payments that can be done in 4 particular periods during the tax year. However, given the fact that these increases are calculated based on actual market interests, especially for companies, it might be more advantageous not to pay in advance the taxes due.

<sup>209</sup> See e.g. special levy of 309% on secret commissions ; proportional tax fines ; specific VAT fines.

<sup>210</sup> Supreme Court, 15 January 1991, Pas. 1991, I, p. 444 ; Supreme Court, 5 February 1999, Pas., 1999, I, p. 537, note of A. Demoulin ; Supreme Court, 24 January 2002 (two decisions), F.J.F., 2002, p. 264 and 434 ; Supreme Court, 7 January 2007, R.G. n° F.06.0056 ; Constitutionnal Court, 6 November 2008, n°157/2008, B.G., 23 January 2009 ; Constitutionnal Court, 18 June 2008, n°91/2008, B.G., 10 September 2009 ; See on this subject Sepulchre, V., *Droits de l'homme et liberté fondamentales en droit fiscal*, p. 438 (Larcier 2005); Sepulchre, V., *Les droits de l'homme et les droits fondamentaux dans le droit fiscal belge, les évolutions des dernières années*, p. 5679 R.G.C.F.(2009/6) ; Bouhon, F., *Réflexions autour de la qualification pénale des amendes fiscales*, p. 681-691, J.T., (2009/36), n° 6370; Khol, A. *Droit pénal fiscal et article 6 de la Convention européenne des droits de l'homme*, J.L.B.G. (1992), 1352-54 ; Maus, M., *Kantrekkeningen rond de fiscaal-administratie sancties en de fiscale geschillenprocedure in het licht van art. 6 E.V.R.M., T.F.R. (1999)*, p. 332-361 ; Smet, F., *Rechterlijke controle op administratie sancties : is de motivering van de evenredigheidstoetsing de sleutel ?*, T.F.R. (2009), n°370, p. 903-910 ; Vandenberghe, I., *De rechertijke bevoegheid inzake administratieve fiscale boeten : een stand van zaken*, Fisc. Act. (2010), n° 12, p. 2-4.

<sup>211</sup> See e.g. : a taxpayer sentenced by the criminal judge to a fine after besides a fiscal penalty paid in the administrative procedure that has the nature of a criminal penalty based on art. 6 of ECHR.

<sup>212</sup> See e.g. : Due to a judgment not rendered within a reasonable period of time.

<sup>213</sup> ECHR, *Sergueï Zolokouthine v. Russia*, 10 February 2009, Rec. N°14939/03, <http://hudoc.echr.coe.int> ; Internation Covenant of New York on civil and political rights of 19 December 1966, art. 14.7, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> ; Charter of Fundamental Rights of the European Union, 2012/C 326/02, art. 50, <http://eur-lex.europa.eu>; 7th Protocol of the European Convention on Human Rights, art. 4, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>214</sup> B.G., 22 October 2012 ; a.o. Tiberghien, A., *Manuel de droit fiscal 2013-2014*, p. 904(Kluwer 2014), ; Zagheven, M., *Una via : de guldenden weg of de weg zoek ?*, in MAES, L., De Cnijf H. and De Broeck, L., *Fiscaal Praktijkboek 2012-2013 – Directe Belastingen*, pp. 217-254 (Kluwer 2012), ; Lippens, S. and Thiel, C., *Het Belgisch una via-model in fiscal strafzaken – Een vervolging en een beteugeling langs één weg ?*, (Kluwer2012); Bours, J.P., *Droit pénal ou fiscal? Electa una via, recursus ad alteram non datur la loi du 20 septembre 2012*”, J.T., (2012), n° 6512, p. 165-174; Gnedasj, S. and Vanhulle, H., *Not even God judges twice for the same act... and tax offence Draagwijdte en grenzen van het ne bis in idem-beginsel*”, T.F.R.(2014/4), n° 466, p. 643-686.

First, the tax authorities and the Public Prosecutor should discuss together in order to assess the most efficient procedure to deal with a fiscal litigation<sup>215</sup>. Without any mandatory character, the law appears as a recommendation on this matter. As such, the discussion is optional and as such we do not see the real added value of this provision<sup>216</sup>. During the discussion, the Public Prosecutor could decide to prosecute the legal offense<sup>217</sup>. As a consequence, the representative of the tax authorities participating to the discussion could not witness in the resulting criminal trial<sup>218</sup>. In the field of VAT, the Public Prosecutor could not prosecute on the sole basis of a complaint or a denunciation from a civil servant not authorized to take part to aforesaid discussion<sup>219</sup>.

Second, if it is decided to follow the criminal procedure, the Public Prosecutor could request the tax authorities' advice. To this end, the Public Prosecutor must provide the tax authorities with the facts he disposes. The tax authorities must convey their advice within the fourth month following the reception of the Public Prosecutor's request<sup>220</sup>.

Third, when it is decided to follow the criminal procedure, the tax authorities must convey the fiscal file to the Public Prosecutor<sup>221</sup>.

Besides, the *ne bis in idem* principle has important procedural consequences. It implies indeed that the claimability of tax increases<sup>222</sup> and tax penalties<sup>223</sup> with the character of a criminal penalty in the sense of article 6 of ECHR, as well as the statute of limitation of the procedure of tax collection, are in principle suspended as soon as the Public Prosecutor initiates criminal procedure<sup>224</sup>. Given it is the claimability of fiscal penalties that could be suspended, the law does not *per se* prevent a taxpayer from a *bis in idem* sanction. Furthermore, should the Public Prosecutor decides to dismiss the procedure ("ordonnance de non-lieu"/"ontslag van rechtsvervolging"), instead of deferring the case before the criminal courts, aforesaid tax increases, tax penalties and statute of limitation are no longer suspended and become again claimable<sup>225</sup>. It therefore exposes the taxpayer to a double degree of legal actions, administrative and criminal, for the same cause of action. As acknowledged in the preparatory work of the law, this clearly infringes the jurisprudence of the European Court of Human Rights defining the *ne bis in idem* principle<sup>226</sup>. The Constitutional Court recognized the infringement of the *ne bis in idem* principle and, therefore, nullified this part of the law<sup>227</sup>. As a consequence, on

<sup>215</sup> Administrative circular of 23 October 2012, A.A.F. n° 9, AFZ/2012-0629, [www.fisconetplus.be](http://www.fisconetplus.be), p. 2 ; Belgian Criminal Procedure Code, art. 29, 3° ; Van Dijck, J., *Principe "una via": concertation préalable entre fisc et Parquet*, Fisco., 25 May 2012, n° 1297, p. 1.

<sup>216</sup> See also Bours, J.P., *Droit pénal ou fiscal? Electa una via, recursus ad alteram non datur la loi du 20 septembre 2012*, op. cit, p. 171.

<sup>217</sup> BITC, art. 460, par. 2.

<sup>218</sup> BITC, art. 463, 4°. ; BVATC, art. 74bis.

<sup>219</sup> BVATC, art. 74, par. 2.

<sup>220</sup> BITC, art. 461 ; BVATC, art. 74, par. 3.

<sup>221</sup> BITC, art. 462 and BVATC, at 74ter.

<sup>222</sup> BITC, art. 444, 5°.

<sup>223</sup> BITC, art. 445, 5°.; BVATC, art. 72, 2°.

<sup>224</sup> BITC, art. 460.

<sup>225</sup> BITC, art. 444, 5°and art. 445, 5°.

<sup>226</sup> Report of 19 June 2012 for the Commission of Finances and Economic Affairs, Senate, Doc. 5-1592/3, p.5-6 ; ECHR, *Sergueï Zolokouthine v. Russia*, op. cit. ; ECHR, 20 November 2012, *Pacifico v. Italy*, n° 17995/08, <http://hudoc.echr.coe.int>.

<sup>227</sup> Constitutional Court, n° 61/2014 of 3 April 2014, J.L.M.B., 14/506, 976-978, note F. Koning, *Loi Una via : inconstitutionnalité de la suspension de l'exigibilité de la sanction administrative*; see also a. o. Vanheeswijk, L., *De gedeeltelijk vernietiging van de una via wet : storm in een glas water?*, T.F.R. (2014) n° 642, p. 467; Lecocq, A., Ceci, E., *Una Via : la Cour constitutionnelle anoblit le "non*

the one hand, any definitive<sup>228</sup> administrative decision should prevent from the opening of a criminal legal action for the same cause of action. On the other hand, as long as the administrative decision is not definitive, the Public Prosecutor could file a legal action. This legal action should suspend the administrative procedure definitively<sup>229</sup>.

As aforesaid, the law aims at providing a unique procedural treatment to a fiscal litigation in order to avoid the addition of multiple criminal penalty (in the sense of art. 6 ECHR). It is therefore crucial to define what kind of surcharges or fiscal penalties are considered as a criminal penalty. In the silence of the law, we must turn again to the Constitutional Court which, in its aforementioned ruling, considers that tax surcharges and tax fines<sup>230</sup>, regardless their rate or amount, have a the character of a criminal penalty (in the sense of art. 6 ECHR). Consequently, it could be argue that the initiation of a criminal legal action is inadmissible as from a decision to inflict any of those tax surcharges and tax fines is definitive.

Even though the Constitutional Court has clarifies some aspects of the law, some interrogations remain. For example, it is currently not clear whether it is possible for the Public Prosecutor to close a “criminal transaction”<sup>231</sup> (“transaction pénale”/“strafrechtelijke transactie”) with the taxpayer that covers fiscal and criminal aspects of a litigation<sup>232</sup>. The future development in this field of the law will provide us with answers to those questions.

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bis in *idem*, Rev. dr. pén. entr., (2/2014), p. 171. Smet, F., *Cour constitutionnelle : la loi « una via » viole le principe non bis in idem*, Fisco., ( 2014), 1382, p. 1.

<sup>228</sup> An administrative decision is definitive by the moment it is not subject to ordinary legal action or after the exercise of this legal action ; ECHR, *Sergueï Zolokouthine v. Russia*, op. cit., par.par. 107-108 ; Supreme Court, 3 January 2012, P.110894.N., 14.

<sup>229</sup> A criminal legal action is considered as « open » upon the moment of the opening of an « information »/« informatie » based on art. 28bis of the Belgian Criminal Procedure Code ; Constitutional Court, n° 61/2014 of 3 April 2014, op. cit., B.17.2.

<sup>230</sup> BITC, art. 444 and 445; BVATC, art. 70.

<sup>231</sup> Belgian Criminal Procedural Code, art. 219bis.

<sup>232</sup> On this question, Smet, F., « ‘Una via’ et transaction : un mariage impossible ? », Fisco, (2012), n° 1317, p. 8.

## Chapter 3: Definition and categorisation of surcharges at the level of third parties

As already mentioned in chapter 2, sometimes it can be hard to distinguish between surcharges/penalties and not benefitting from a favourable tax regime. Only measures, particularly aimed at ensuring the compliance of a third party with his/her tax duties will be further described. As some penalties equally apply for taxpayers and third parties, this will be mentioned through a reference to the previous chapter. This chapter will only deal with measures, particularly aimed at third parties.

### 3.1. Criminal / Civil penalties

Both tax codes<sup>233</sup> provide that accomplices in a crime are severally liable for the payment of the taxes due. Although both articles are mentioned in the respective chapters with criminal penalties, nonetheless the Supreme Court<sup>234</sup>, as well as the Constitutional Court<sup>235</sup> judged at several occasions that this liability is not a criminal penalty, but a civil consequence of a criminal conviction. This liability is only meant to compensate the Treasury for the tax losses caused by the tax fraud they supported. It does not apply for eventual tax increases, penalties, interests and other costs, and applies only for the part of the taxes the judge has convicted another taxpayer as guilty. The tax administration primarily has to address the convicted taxpayer and can only as a subsidiary measure address to the accomplice. Finally the accomplice can turn to the taxpayer himself for the taxes paid. As it is considered not to be a criminal penalty aspects of criminal law (such as mitigating circumstances, suspension of a conviction, ...) do not apply. Nonetheless the Courts accept that an accomplice can bring this claim to courts with a full power, according to art. 6 ECHR. However, the exact judicial powers, as well as the exact consequences remain a bit unclear.

As concerns income taxes it has been accepted that a third party can lodge a complaint against all aspects<sup>236</sup>, but the procedure, as well as the results of the procedure remain vague. It is not clear within what time this person has to act, neither whether the consequences when a claim is approved also apply for the taxpayer or other concerned parties, ...<sup>237</sup> As concerns VAT, the Constitutional court decided that, because tax is due once the facts are considered to be proven, an accomplice can still dispute his liability in front of the courts, but the existence of the tax debt as such can no longer be disputed. Therefore, one could still discuss its liability, but the amount of eluded taxes has to be accepted<sup>238</sup>.

Besides this general application, as already mentioned, both codes provide in very particular circumstances that a third person can be held responsible for the tax debts of someone else.

<sup>233</sup> BITC, art. 458, 1th part and BVATC, 73sexies.

<sup>234</sup> Supreme Court, 20 June 1995; Supreme Court, October 15, 2002; Supreme Court, 21 October 2008 and Supreme Court, 20 January 2009, [www.cassonline.be](http://www.cassonline.be)

<sup>235</sup> Constitutional Court, 18 June 2009, nr. 99/2009; Constitutional Court, 9 July 2009, nr. 112/2009; Constitutional Court, 16 July 2009, nr. 117/2009 and Constitutional Court, 20 October 2009, nr. 159/2009, [www.const-court.be](http://www.const-court.be).

<sup>236</sup> This encompasses his liability as well as the levied taxes themselves.

<sup>237</sup> Cf. Delanote, M., and Vanden Brande, J., *Het bezwaarrecht van derden*, R.A.B.G. (2009), 1256 and following.

<sup>238</sup> See e.g. Court of Appeal, Antwerp October 20, 2009. See for a critical note Smet, F., *Daders en medeplichtigen van fiscale misdrijven vinden geen soelaas bij het Grondwettelijk Hof*, T.F.R. (2010), 310-317.

These measures are not always because a third person would be responsible for the actions, but sometimes guarantee that the tax authorities will be able to collect the taxes due<sup>239</sup>. Besides these particularities each natural/legal person is severally liable for penalties and costs caused by the people they have appointed, their directors, administrators or liquidators<sup>240</sup>. As both texts mention, this is a civil consequence and not a criminal sanction. As VAT is a tax due because of (mostly) an activity between two different actors, the contracting party of the taxpayer will be held severally responsible for the VAT in case of incorrect invoices or administrative documents, unless it can prove having paid the correct VAT and indicates his supplier<sup>241</sup>. Again this is not considered to be a criminal penalty. This is different from the penalty of twice the payable taxes provided in VAT in case of incorrect invoices, which might be due by both parties individually<sup>242</sup>.

### **3.2. Other surcharges**

The most important role of third parties is from an administrative point of view and concerns informing the tax administration of certain tax aspects. Notifications have to be done, that will alert the tax administration and help to verify whether (other) taxpayers correctly fulfil their tax obligations. A lack of declarations is sanctioned with refusing the deduction of certain expenses, but can also lead to additional taxes.

The most obvious measure concerns wages and salaries: all different kinds of remuneration attributed have to be declared separately on an individual tax sheet, as well as a collective tax sheet to be deductible<sup>243</sup>. This declaration can be matched by the tax authorities with the declaration of the person receiving the income and leads to an effective control, whether the latter declared his taxable income. If a corporation employer does not declare these tax sheets, the costs will still be deductible, but the company risks to be submitted to an additional tax of 300 % (+ 3% opcentimes)<sup>244</sup>, irrespective of its further result being submitted to the regular corporate income tax. This tax, called the “secret commissions tax” was meant to replace all taxes that would have been due, in case the non-declared income would have been correctly declared. Therefore, a waiver for this tax exists, if it can be proven that the non-declared income was nonetheless correctly taxed at the level of the person receiving the income.<sup>245</sup> Given the fact that the tax was calculated on the basis of avoided taxes through non-declaration, it has been disputed whether this tax could be considered to be a penalty or was only a compensation. Only if it could be considered to form a penalty, according to art. 6 ECHR, it would be submitted to full judicial control and judges could reduce the penalty.

The Belgian Constitutional Court judged that this tax could have a punitive effect<sup>246</sup>, whereas the Supreme Court argued that it is not a penalty “*insofar as* it is meant to compensate taxes and

<sup>239</sup> Cf. Chapters 1.1.5.2. and 1.2.4.

<sup>240</sup> BVATC , art. 73sexies and BITC, art. 458, 2<sup>nd</sup> part.

<sup>241</sup> . 51bis.

<sup>242</sup> BVATC, art. 70, par.2 BVATC.

<sup>243</sup> BITC, art. 57.

<sup>244</sup> BITC, art. 197 and 219. This same tax is also levied on profits a company made, without them being reflected in the companies tax declaration (defined as “verdoken meerwinsten”/“bénéfices dissimulés”, hidden additional profits), as well as costs made for bribery.

<sup>245</sup> BITC, art. 219, 4th part.

<sup>246</sup> Constitutional Court, 6 June 2014.

social contributions”<sup>247</sup>. Therefore there is still no clear answer whether the courts could reduce this additional tax and to what precise level<sup>248</sup>.

The last years, due to changes in the administrative practice, this secret commissions tax was “used” in a more severe way, in different situations whereby an advantage in kind was supposed to be accorded, not being mentioned by the corporation and therefore also leading to this additional tax. After several administrative circulars clarifying the purpose of this additional tax, the legal regime has been changed. As the basic aim was to be able to impose the taxpayer receiving the distributed advantage a second waiver has been installed. Even when a distributed salary was not yet taxed at the level of its receiver, this tax could still be avoided if the salary could still be taxed at the level of the receiver.<sup>249</sup> Although in this latter case the income was not rightfully declared, still the additional tax does not apply, but in this case the payments will legally not be deductible any longer at the level of the distributing company<sup>250</sup>.

In its most recent Government agreement (of 2014), the Belgian Government accepted to lower this additional tax towards a “more humane” level, enlarging the options to re-establish a correct taxation to avoid the surtax, as well as lowering the surtax to 100/50 % depending on the receiver of the advantages. It seems therefore that the importance of this measure, being reactivated a few years ago due to severe administrative practice has lowered down again.

Besides art. 307 BITC<sup>251</sup> also provides a particular obligation for companies<sup>252</sup> to mention all of their payments to “suspected countries”. A country is “suspected” if it does not adhere to the OECD standards concerning exchange of information, as being verified by the Global Forum on Transparency and Exchange of Information for Tax Purposes, or if it is considered to be a State without or with a low tax.<sup>253</sup> The payments have to be declared on a particular form once they reach a combined amount of EUR 100,000. If the payments (or part of them) are not declared, they are not deductible, while all declared payments are particularly verified by the tax administration.<sup>254</sup> The tax administration has given a very large interpretation to this regulation. As such “a payment” is considered to be each transfer of values<sup>255</sup>, taken into account for its gross value<sup>256</sup> and the payment is considered to be located in a suspected country when the receiver is a resident or when it is paid to a bank account hold there.

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<sup>247</sup> Supreme Court, 10 September 2010.

<sup>248</sup> In a judgment of 2011, the Ghent Court of Appeal judged that 2/3 of the tax would be a compensating part, while 1/3 would be a penalty submitted to the judgement of the Court. Cf. Ghent, 4 October 2011.

<sup>249</sup> BITC, art. 219, 5th part.

<sup>250</sup> However, administrative practice still accepts deductibility of the costs, in case a corporation is supposed to act in good faith. Cf. Circular nr. CI. RH.421/628.803, 22 July 2013. This administrative practice is however not always followed in proceedings before the Court. As such, this administrative tolerance was rejected in Court of Appeal Antwerp on 16 September 2014, Acc.&Fisc. (2014), nr. 35, 7.

<sup>251</sup> BITC, art 307, par. 1, 6th till 8th part..

<sup>252</sup> This regime is applicable for domestic corporations submitted to the Belgian corporate income tax, as well as foreign corporations, receiving Belgian income submitted to the corporate income tax for non-resident companies.

<sup>253</sup> Reference is made to a nominal tax rate below 10 %. However, the Tax Administration also provides for a list, mentioning 30 countries. (Cf. Art. 179 Royal Decree in execution of the BITC)

<sup>254</sup> BITC, art. 198, par. 1, 10°. The taxpayer has to prove that the payments correspond to real economic activities and do not fall within a tax avoidance structure. Of course, all further anti-avoidance legislation can also be applied in this case. The same regulation applies for non-resident companies via a reference to this in BITC, art. 235, 2°.

<sup>255</sup> It is not important whether or not it represents a cost, it can be a payment from a foreign permanent establishment of a Belgian company and in principle also payments for third parties are taken into account. As concerns this last aspect, exceptions are foreseen for financial institutions, as this would not be manageable.

<sup>256</sup> This applies even when withholding taxes are levied for the Belgian Treasury.

## Chapter 4: Legal Protection of the Taxpayer/Third Parties

### 4.1. Legal procedures

#### 4.1.1. Legal Principles

The principle of equality is a constitutional principle which, besides the general provisions<sup>257</sup>, receives a specific wording in the field of tax law in the Belgian Constitution. No privileges may be introduced in tax matters and no tax exemptions or reductions in tax may be introduced other than by statute<sup>258</sup>. It follows that all taxpayers that are in a similar situation must be taxed in a similar way. Conversely, taxpayers that are in different situations must be treated differently, but as equally as possible in comparison with other taxpayers. A tax that affects only one person may nonetheless be legal, provided it was not the tax legislator's intention to limit the application of that tax to a given taxpayer and provided the apparent inequality so created is not arbitrary<sup>259</sup>.

Specific constitutional provisions are dealing with tax law, as the "principle of legality". According to this principle, no tax for the benefit of the State may be levied except by way of a statute<sup>260</sup>. The introduction of taxes, i.e., the establishment of the principle of taxes and the determination of the tax base, tax rates and tax exemptions is reserved to Parliament, which has exclusive competence in tax matters ("no taxation without representation")<sup>261</sup>. This competence may not be transferred to the judiciary or to the executive power<sup>262</sup>.

The legality principle laid down in the Belgian Constitution implies that tax law must be interpreted in a strict manner, meaning that the statute must be given the full scope intended by the tax legislator. The interpretation principle so derived is consistent with the inherent nature of tax law, which derogates from the fundamental principle that goods and persons are free by nature. It is also consistent with the consideration that tax laws are of public order, excluding any form of free interpretation.

The fact that tax law must be strictly interpreted has two major consequences. First, tax laws may not be applied by way of analogy, so that the application of a tax provision cannot be extended to cases merely on the ground that they show a sufficient degree of similarity with the cases expressly covered by that provision. Application of tax law by way of analogy constitutes an application *praeter legem* (i.e., "beyond" the statute) and, hence, is inherently incompatible with the constitutional legality principle. Second, no tax is due without strict evidence to support it<sup>263</sup>. Thus if, after exhausting all ordinary interpretation methods, a judge continues to have lasting doubts as to the correct meaning of the statute, he must interpret the statute in favour of the taxpayer (*in dubio contra fiscum*)<sup>264</sup>.

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<sup>257</sup> Belgian Constitution, art. 10 and 11.

<sup>258</sup> Belgian Constitution, art. 172.

<sup>259</sup> Supreme court, 17 October 1939, Journ.prat.dr.fisc.fin., 1940, 43; Council of State, 9 December 1949, Pas., 1950, IV, 65; Council of State, 12 May 1960, Pas., 1962, IV, 1; Supreme court, 14 October 1971, Rev.fisc., 1972, 29; Supreme court, 6 February 1984, Pas, 1984, I, 635; Supreme court, 13 March 1987, R.W., 1986-87, 2788.

<sup>260</sup> Belgian Constitution, art. 170, par.1.

<sup>261</sup> Supreme Court, 21 May 1982, Arr. Supreme Court, 1981-82, 1172.

<sup>262</sup> Constitutional Court, 13 March 2008, n° 54/2008.

<sup>263</sup> Supreme Court, 24 October 1938, Arr. Supreme Court, 1938, 219; Supreme Court, 28 May 1942, Pas., 1942, I, 134.

<sup>264</sup> Constitutional Court, 18 June 2008, n° 91/2008.

Article 171 of the Belgian Constitution provides for the so-called “principle of annuality”. Taxes for the benefit of the State, the Communities and the Regions must be voted annually and the rules that introduce such taxes are valid only for one year, unless renewed. It is because of the “annuality” principle that the annual budget law contains an express provision stating that the tax legislation as it is in force on 31 December is to remain in force for the following year.

Only the Constitutional Court is competent to test the potential infringement of the Constitution’s principle by a statute<sup>265</sup>. The Constitutional Court must arbitrate conflicts between national statutes and regional or Community decrees or between regional or Community decrees, as well as violations by a national law or a regional or Community decree of the articles contained in title II of the Constitution (rights and freedoms of Belgians) as well as in Articles 170 and 172 (legality of taxes and equality with respect to taxes) and 191 (protection of foreigners).

The Constitutional Court’s assessment may be summarized in two questions: i) could the difference of treatment be objectively and reasonably justified? ii) Is the difference of treatment proportionate in terms of comparison between the means foreseen and the measure’s objective? Any potential infringement discovered by an ordinary Court could be the subject of a prejudicial question directed to the Constitutional Court. Ordinary Courts must follow the decision of the Constitutional Court. Ordinary Courts are controlling the respect of those principles for norms lower than a statute (e.g. a Royal Decree)<sup>266</sup>. Principles of equality and proportionality are therefore effectively protected by Belgian Courts.

The territoriality principle, one of the aspects of the fiscal sovereignty of a State, is not a Constitutional provision but may be derived from the traditional view according to which tax law is part of public law. Pursuant to the territoriality principle prevailing in tax matters together with Article 3 of the Belgian Civil Code, laws of police and security are binding on all persons residing in the Belgian territory.

The territoriality principle makes the levying of taxes dependent on the existence of a sufficient nexus between the subject or subject matter of a given tax and the Belgian territory. Such a nexus may be personal or real in nature. The nexus is personal if the levying of taxes depends on the place of residence or establishment of an individual or a legal person (the “residence principle”). The nexus is real when the levying of taxes is based on the source of the income or on the situation of goods, legal acts or material acts that are the subject matter of such taxes (the “situation or source principle”).

The non-retroactivity principle is not contained in the Belgian Constitution but is laid down in Article 2 of the Belgian Civil Code. It follows that the (tax) legislator may derogate from this principle.

Besides, the principle is not absolute in the sense that a judge must apply newly introduced laws to past situations if that was the explicit, or implicit but certain, intention of the legislature<sup>267</sup>. Article 108 of the Law of 4 August 4 1986 provides that decrees implementing tax

<sup>265</sup> Belgian Constitution, art. 142 ; Supreme court, 24 January 1996, Larcier, Supreme court, n° 142, Pas., p. 113.

<sup>266</sup> Belgian Constitution, art. 159.

<sup>267</sup> Supreme court, 18 January 1924, Pas., 1924, I, 141; Supreme court, 28 November 1939, Pas., 1939, I, 495. Malherbe, J., and Daenen, Ph., *Retroactivity of Domestic Tax Laws and Tax Judgments of the European Court of Justice. The Belgian Perspective and the European Context*, International Tax Law Review 3, 13 (2009).

laws may only dispose for the future and, hence, have no retroactive effect, except in the event of an express derogation contained in the relevant law. This is consistent with the case law, according to which the executive power must respect the general non-retroactivity principle when implementing a law without retroactive effect<sup>268</sup>. The non-retroactivity principle applies, without limitation, to the provincial and municipal authorities, whose tax regulations cannot derogate from a general principle of law.

According to the Supreme Court (Cour de Cassation/Hof van Cassatie), there is no simulation and, hence, no tax fraud when a taxpayer, with a view to benefiting from a more favourable tax regime, uses the freedom of contracts, without however infringing a legal obligation, to establish legal acts, all the consequences of which the taxpayer accepts, even if the legal form the taxpayer gives to such acts is not their most common form<sup>269</sup>. A legal construction can be upheld against the tax authorities even if it appears from the facts and circumstances that the legal form chosen by the parties was used for the sole purpose of avoiding tax<sup>270</sup>. Under Belgian tax law, therefore, taxpayers are free to opt for the “least taxed route” (*choix de la voie la moins imposée/keuze van de minst belaste weg*).

Tax avoidance in the form of the free choice of the least taxed route must be clearly distinguished from tax fraud in the form of simulation (“sham transactions”). The latter concept refers to a situation whereby the parties establish, with a fraudulent intent or with the intention of causing damage, an apparent act given civil or legal effect that disguises the actual act not given civil or legal effect to which only the parties are privy. Simulated legal acts cannot be upheld against third parties (including the tax authorities).

Supranational treaties with direct national effect<sup>271</sup> prevail over Belgian domestic tax law, meaning that the latter must be interpreted in light of the former. In a landmark decision of 27 May 1971, the Supreme Court held that in the event of a conflict between an international legal norm with direct consequences in the domestic legal order and a domestic legal norm, the treaty norm should prevail. This primacy results from the very nature of international law. Among other consequences, such primacy implies the direct application of all principle provided for by the European Convention on Human Rights<sup>272</sup>. Those legal principles are therefore applied by the Belgian Courts.

As discussed above (section 2.5.), the *ne bis in idem* principle has recently been introduced into Belgian tax law<sup>273</sup>. We redirect the reader to this section for more information.

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<sup>268</sup> Supreme court, 22 October 1970, Arr. Supreme court, 1970, 823. The Constitutional Court has repeatedly ruled against the retroactive effect of tax measures considering there is no justification for it (see, e.g., Court of Arbitration, 23 June 2004, cases n° 109/2004 and 110/2004).

<sup>269</sup> Supreme Court, 6 June 1961, Pas., 1961, I, 1082.

<sup>270</sup> Supreme Court, 22 March 1990, F.J.F., 1990, No 90/210 annotated by Van Crombrugge, S.

<sup>271</sup> See e.g. the European Union (EU) treaty, the European Convention on Human Rights, Double-tax treaties and the United Nations treaty.

<sup>272</sup> Supreme Court, 27 May 1971, Arr. Supreme court, 1971, 959.Sepulchre, V., *Les droits de l'homme et les droits fondamentaux dans le droit fiscal belge : les évolutions des dernières années*, R.G.C.F. (2009), 524 ; Huybrechts, L, Malherbe, J., et al., *Fondamentele Rechten van de Belastingplichtige*, , Ced. Samsom(1998).

<sup>273</sup> B.G., 22 October 2012 ; Tiborghien, A., *Manuel de droit fiscal 2013-2014*, p. 904, (Kluwer 2014), ; Zagheven, M., *Una via : de gouden middenweg of de weg zoek ?*, in Maes, L., De Cnijf H. and De Broeck, L., *Fiscaal Praktijkboek 2012-2013 – Directe Belastingen*, 217-254 , (Kluwer 2012); Lippens, S. and Thiel, C., *Het Belgisch una via-model in fiscal strafzaken – Een vervolging en een betegeling langs één weg ?*,(Kluwer 2012).

#### **4.1.2. Advance Tax Rulings**

Belgium has a general system of advance rulings. This system is materialized by the Advance Ruling Commission (*Service des Décisions Anticipées / Dienst Voorafgaande Beslissingen*).

An advance tax ruling is defined as a legal act whereby the tax authorities make a conditional unilateral commitment regarding the way in which the law will be applied to a situation or transaction that has not yet generated any tax effects. For this purpose, the law refers to rules of law of general scope (such as treaties, the statute and decrees). The unilateral act is legally binding on the taxpayer *vis-à-vis* the taxpayer that requested the advance ruling, provided the situations or transactions concerned materialize in accordance with the way in which they are described by the taxpayer. However, there is no obligation on the part of the taxpayer to carry out the transactions that are the subject of the ruling request.

The ruling request must relate to a specific, concrete situation or to a transaction whose implementation is genuinely contemplated and, hence, may not refer to a purely theoretical issue. A ruling request can be submitted by a resident or non-resident taxpayer, an individual or a legal entity, whether or not acting in the course of its professional activity, or a foreign party contemplating an establishment or investment in Belgium. The ruling request must be reasoned and indicate the statutory or regulatory provisions that the ruling is to cover. The request must be accompanied by copies of other ruling requests pertaining to the same subject that were submitted to tax authorities of other EU Member States or of third countries with which Belgium has concluded tax treaties.

The advance ruling must precede the establishment of the tax, meaning that no advance rulings can be issued for transactions or situations that have been realized and for which the application conditions of the tax have been definitively satisfied. However, this does not prevent certain preparatory transactions from already having been implemented, especially in the case of linked or complex transactions. In that event, the issuance of an advance ruling is still possible, provided it is applicable to the whole of the transaction and, hence, retroactively to that part of the transaction that has already been implemented and has not yet generated any tax effects<sup>274</sup>.

#### **4.1.3. Procedures**

##### **4.1.3.1. Administrative Procedure**

As regards income taxation, any taxpayer (or his/her spouse or partner) subject to an enrolled tax may lodge an administrative claim with the regional tax director against said tax within a period of six month following the enrolment of the tax<sup>275</sup>. This claim may be directed against taxes, additional taxes, penalties and surcharges<sup>276</sup>. In this procedure, regional tax directors are considered as administrative authorities who pronounce a motivated decision regarding the taxpayers' grievances in connection with enrolled tax (or his/her spouse or partner's)<sup>277</sup>. A hearing may be requested to the tax authorities by the claimant<sup>278</sup>. During the administrative procedure, accrual of late payment interests is suspended.

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<sup>274</sup> Law of 24 December 2002, B.G. of 31 December 2002 (second edition).

<sup>275</sup> BITC, art. 371.

<sup>276</sup> BITC, art. 366.

<sup>277</sup> Constitutional Court., Arrest n° 67/98 of 10 June 1998, J.T., 1998, p. 675.

<sup>278</sup> BITC, art. 374, 3°.

Article 376 of the BITC provides for an administrative procedure of *ex officio* tax relief. The tax relief may be granted *ex officio* by the tax authorities or may be requested by the taxpayer within a period of five years following the 1<sup>st</sup> January of the year during which the tax has been collected. This tax relief is a procedure foreseen for limited cases. Those cases are: i) surcharges due to clerical mistakes; ii) surcharges resulting from double counting; iii) surcharges appearing following new documents or facts; iv) excess of tax credit, withholding taxes or advanced tax payments; v) misapplication of some fiscal reductions; and vi) wrong imputation of advanced tax payments.

A mediation procedure for handling conflicts that arise between taxpayers and the various branches of the tax authorities in federal tax matters was introduced with effect from 1 November 2007<sup>279</sup>. The objective of this procedure is to reduce the number of tax cases before the courts. It is materialized by a Service of Conciliation which is competent for every federal and regional tax for which the collection is assured by the Federal tax authorities. The Service does not intervene as an administrative authority<sup>280</sup>. Its objective is to conciliate the tax authorities and the taxpayer without providing binding decision for the parties. Details of the mediation procedure are set out in a Circular Letter of 29 January 2008<sup>281</sup>.

#### **4.1.3.2. Civil Procedure**

Any director's administrative decision may be challenged – and therefore claims on surcharges and penalties in connection herewith- by the taxpayer (or his/her spouse or partner's) subject to the enrolled tax (challenged by the administrative claim) by lodging a legal action to the Court of First Instance<sup>282</sup>. The administrative claim is however a required preliminary to any fiscal legal action<sup>283</sup>. In the absence of such preliminary, the administrative decision may not be challenged anymore and is therefore definitive.

Once the legal action is lodged, common legal rules governing any judicial procedure are applicable. The first legal step, according to these rules, is the filing by the taxpayer of a petition ("requête contradictoire"/"tegenstrijdige verzoekschrift") with the Court of First Instance ("tribunal de première instance"/"rechtsbank van eerste aanleg"). Such joint petition must comply with required formalities (e.g. name of the parties, address of the parties)<sup>284</sup>. Even if unusual, based on article 1385decies, 3<sup>rd</sup> indent, of the Judicial Code, the filing of the legal action may be embodied in summons as well<sup>285</sup>.

Subsequently, an introductory hearing must be scheduled at the earliest 8 days after the filing of the petition<sup>286</sup>. The introductory hearing generally allows the parties to agree upon the next steps of the procedure such as the time period for exchange of briefs; otherwise the judge decides<sup>287</sup>. The parties then proceed to the preparing of the case ("mise en état"/"in staat stelling") which consists of exchange of briefs and evidences (generally documentary) according to the schedule agreed upon. Upon completion of the preparing of the case, hearing for oral

<sup>279</sup> Law of 25 April 2007, Art. 116, par. 1 (B.G. of 8 May 2007) and R.D. of 9 May 2007 (B.G. of 24 May 2007).

<sup>280</sup> Stevenart Meeùs, F., *Manuel de procédure fiscale*, op. cit., p. 449.

<sup>281</sup> Circular Letter of 29 January 2008, n° AFZ/2007-0576 (AFZ 1/2008).

<sup>282</sup> Jud. C., art. 569, 1st ind., 32°.

<sup>283</sup> Jud. C., art. 1385decies.

<sup>284</sup> Jud. C., art. 1034 bis to 1034 sexies and art. 1385 decies.

<sup>285</sup> Supreme court, 30 April 1990, Pas., 1990, I, 1003.

<sup>286</sup> Jud. C., art. 707.

<sup>287</sup> Jud. C., art. 747.

pleadings takes place<sup>288</sup>. Following said hearing, the Judge takes the case in his Chambers<sup>289</sup>. The Judgment should normally be delivered within a period of one month after the hearing<sup>290</sup>.

Notification of the judgment opens a right to appeal within one month of notification by a bailiff to the Court of Appeal<sup>291</sup>. This period of one month suspends the right for the parties to execute the decision of the first judge. Rules governing procedure before the Court of Appeal are identical to the ones governing procedure before the Court of First Instance<sup>292</sup>.

A final appeal may be brought before the Supreme Court ("Cour de Cassation"/"Hof van Cassatie") within a period of three months following the notification by a bailiff of the judgement to the defeated party<sup>293</sup>. The Supreme Court only assesses compliance of the final judgment with the law and substantial formalities for which the penalty of nullity is prescribed.

As a consequence of the judicial claim, tax amounts exceeding taxes indisputably due may not be recovered by the tax authorities by means of forced execution until the judgement acquires the force of *res iudicata*<sup>294</sup>. Late payment interests suspended during the administrative claim procedure resume their accrual with the reference of the matter to the Court of First Instance<sup>295</sup>. The statute of limitations is suspended from the initiation of the procedure until the judgement acquires the force of *res indicata*<sup>296</sup>.

As regards VAT, only the judicial procedure is possible. No administrative procedure allowing the taxpayer to file a claim is foreseen by the law.

#### **4.1.3.3. Criminal Procedure**

There is no specific tax criminal procedure. Common rules applicable to criminal procedure, together with common legal procedural guarantees (e.g. right to not self-incriminate oneself ; right to a fair trial), are applicable to criminal procedure in the field of tax law. Hence, for the purpose of this article, we do not consider an in-depth analysis of such procedure relevant. We will therefore limit the present section to specific rules applicable to tax criminal procedure.

Any criminal procedure is initiated by the Public Prosecutor<sup>297</sup> who may request the tax authorities' preliminary opinion<sup>298</sup>.

The Public Prosecutor may initiate the criminal prosecution on the basis of a victim's complaint or a public civil servant's denunciation provided specific formalities are complied with<sup>299</sup>.

Any civil servant within the tax authorities is allowed to ascertain and to draw up an official report on any public offence<sup>300</sup>. In order to denounce any potential criminal offence, a public

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<sup>288</sup> Jud. C., art. 756 and foll.

<sup>289</sup> Jud. C., art. 769.

<sup>290</sup> Jud. C., art. 770.

<sup>291</sup> Jud. C., art. 1050 and 1051.

<sup>292</sup> Jud. C., art. 1042.

<sup>293</sup> Jud. C., art. 1073.

<sup>294</sup> BITC, art. 410.

<sup>295</sup> BITC, art. 414.

<sup>296</sup> BITC, art. 443ter, par. 2.

<sup>297</sup> BITC, art. 460 ; BVATC, art. 74, par. 1.

<sup>298</sup> BITC, art. 461 ; BVATC, art. 74, par. 3.

<sup>299</sup> BCC, art. 29.

<sup>300</sup> See, *inter alia*, Administrative Commentary of BITC, n°460/14.

servant must be preliminarily authorised to do so by the competent regional director<sup>301</sup>. The tax authorities have no right to directly initiate the criminal procedure<sup>302</sup>.

Conversely, in order for the tax authorities to collect the correct amount of taxes, the Public Prosecutor may authorise the tax authorities to consult a criminal file<sup>303</sup>.

Any public servant from the tax authorities may not be requested to give evidence as a witness before the Court upon the Public Prosecutor's request<sup>304</sup>.

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<sup>301</sup> BITC, art. 462 ; BVATC, art. 74quater.

<sup>302</sup> Spreutels, J., Roggen, F., Roger France, E., *Droit pénal des affaires*, pp. 782 and foll,(Bruylant 2005).

<sup>303</sup> BITC, art. 327.

<sup>304</sup> BITC, Art. 463 ; BVATC, art. 74bis.

## Chapter 5: Deductibility of Surcharges

As a general rule, only expenditures realized during the taxable year in order to acquire or maintain taxable income are tax deductible<sup>305</sup>.

Taxes that are not excluded from the tax deductible items remain deductible. Specific taxes are consequently expressly excluded from the tax deductible items. Based on this rule, corporate income tax, personal income tax and its additional regional and local taxes, withholding tax on personal property, or professional withholding tax are not tax deductible.

On the contrary, surcharges, forfeitures, interest for late payment and other penalties are, in principle, not considered as deductible business expenses when they relate to a tax non-deductible in itself<sup>306</sup>. When non-deductible taxes are paid by a third party who is not personally liable of its payment (e.g. a company paying the taxes of its employee) the Court of Appeal of Liège has considered that it remains non-deductible for such third party<sup>307</sup>. Though arguable, this solution seems in line with the position of the tax authorities<sup>308</sup>. However, an uncertainty remains on this matter.

Regional taxes are in principle considered as not tax deductible<sup>309</sup>. This principle suffers however important exceptions such as registration duties, property taxes and inheritance taxes that are not tax deductible<sup>310</sup>.

In the field of corporate income tax, the special levy on secret commissions is deductible from the taxable base, as are the secret commissions themselves<sup>311</sup>. The fairness tax, though it could be considered as contrary to European law<sup>312</sup>, is not deductible from taxable base<sup>313</sup>.

Fines are not deductible, either even when they are paid by persons who are not at fault and whose civil liability exclusively results from their business activities and the acts performed by their agents<sup>314</sup>. Fines normally due by workers or directors of a company but paid by this company are not tax deductible for the company, unless the company considers it as a taxable benefit in kind in the hands of the worker or the director<sup>315</sup>.

Fiscal surcharge that has the nature of a fine in application of article 6 of the European Convention of the Human Rights is in principle not tax deductible and could be reduced by the

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<sup>305</sup> BITC, art. 49.

<sup>306</sup> BITC, Art. 53, 2° to 6° and Art. 198, par. 1 1° to 5°; e.g. corporate income tax; withholding tax on personal property; or professional withholding tax; Liège, 2 March 1994, Fid. Ber., 1994, 97; Supreme court, 15 November 1996, J.D.F., 283, note Deruyck, F. and N.F.M., 887, 79, note Gregoire, D.; Ghent, 20 October 2000, F.J.F., n° 2001/43.

<sup>307</sup> Liège, 22 December 2006, n° 2006/RG/313, Fisco., 2008, n°1102, p. 12 ; contra Court of Instance of Liège, 6 September 2005, T.F.R., 2006/11, n°303.

<sup>308</sup> Administrative Circular of 3 August 2008, op. cit., II, 1. ; Administrative Commentary of BITC, n° 53/47 ; n° 53/53 and n° 53/54.

<sup>309</sup> BITC, art. 53, 3° and art. 198, 5°.

<sup>310</sup> All taxes covered by art. 3 of the special statute of 16 January 1989 on the financing of the Communities and the Regions are considered not tax deductible.

<sup>311</sup> BITC, Art. 197 and 198, 1.

<sup>312</sup> See on this subject a.o. Dhaene, M., Brohez, A., *De fairness tax: een grondige analyse en enkele bedenkingen omtrent de verenigbaarheid met hogere rechtsnormen*, T.F.R. (2013), liv. 451, 897-914 ; Denis, V., Otten, S. and Delacroix, P., *La « fairness tax* (II), C & FP (2014/8), 2-29.

<sup>313</sup> BITC, art. 198, par. 1<sup>er</sup>, 1° ; art. 219ter ; Administrative Circular of 3 April 2014, n° 13/2014 (n° Cl.RH.421/630.788), [www.fisconetplus.be](http://www.fisconetplus.be).

<sup>314</sup> BITC, art. 53, 6.

<sup>315</sup> Introduced by the Statute of 18 December 1990, B.G., 29 December 1990; see also X., *Aftrek boeten verderbeperkt*, Fisco., n° 321, 2 (1991).

judge who disposes of a full jurisdictional control<sup>316</sup>. However, the position of the tax authorities on this matter remains discussed. Based on its administrative circular, among others, the tax authorities consider as not tax deductible: any fine or penalty provided by the BITC and non-proportional or fixed VAT fine or penalty.

As regards proportional VAT fines, the Supreme Court considered in the past that it had not the character of a criminal penalty but of an administrative penalty<sup>317</sup>. Following this decision, the tax authorities considered those penalties as tax deductible<sup>318</sup>. Based on decisions of both the Supreme Court<sup>319</sup> and the Constitutional Court (then "Court of Arbitrage")<sup>320</sup>, the debate on their deductible character has been re-opened. However, the tax authorities still consider that, "in general", the proportional VAT penalties must remain tax deductible<sup>321</sup>. Proportional VAT fines are paid by a third party, different from the liable taxpayer, it has been considered by the Court of Appeal of Ghent as tax deductible<sup>322</sup>.

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<sup>316</sup> See a.o. Van De Woesteyne, *De aftrek als beroepskost van fiscale en niet-fiscale administratieve geldboeten*, T.F.R. (2010), p. 375 ; Supreme court, 12 January 1995, F.J.F. N° 1995/35, p. 69; Fisco. n° 508, p. 5; see also Supreme court 15 November 1996, J.D.F. 1997, 283; Fisco. n° 664, p. 11 ; Tribunal of First Instance of Leuven, 8 April 2005, Fisco. n° 1044, p. 10 ; Tribunal of First Instance of Ghent, 13 November 2003, Fisco. n° 921, p. 9 ; Ghent, 27 March 2007, F.J.F. N° 2007/283; Fisco. n° 1075, p. 14; Constitutional Court, 20 December 2012, n° 161/2012.

<sup>317</sup> Supreme court 12 January 1995, F.J.F. N° 1995/35, op. cit.; confirming Liège 2 March 1994, F.J.F., n°94/166 and Ghent 24 October 2000, op. cit.

<sup>318</sup> Administrative commentary n° 53/97.

<sup>319</sup> Supreme court, 5 September 1999 (two decisions), J.L.M.B. (1999), pp. 537 and 541.

<sup>320</sup> Court of Arbitration, 24 February 1999, J.L.M.B., 1999, p. 532.

<sup>321</sup> Administrative Circular, Ci.RH.243/588.588 (AFER n° 25/2008) ; see also Parliamentary questions no 101, 129 et 806, 10 November 2010, Chambre, 2010-2011, CRIV 53 COM 029, [www.lachambre.be](http://www.lachambre.be).

<sup>322</sup> Ghent, 24 October 2000, op. cit. ; Desterbeck, S., *Beroepskosten. Ook B.T.W.-boeten die men betaalt voor een derde, zijn aftrekbaar*, Fisc. Act. (2000), no. 38, 38/7-8.

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