Netherlands; Belgium

Dutch District Court Rules Belgian Resident Entitled to Mortgage Interest Relief Under Domestic Law, *Schumacker* Doctrine

12 May 2023

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The District Court of Zeeland-West-Brabant(*Rechtbank Zeeland-West-Brabant*) has recently issued its decision in Case No. BRE-21_4922. The Court ruled that a Belgian resident earning less than 90% of his income in the Netherlands was entitled to his deduct mortgage interest from his Dutch taxable income.

Details of the decision are summarized below.

(1) Facts. X was a tax resident of Belgium and owned a residence with his partner there. They took out a mortgage on the house, and the interest paid in the year in question (2015) was EUR 8,790, of which EUR 5,000 was deductible (under Dutch rules). X worked in the Netherlands for a Dutch employer from which he earned EUR 120,000. His partner had no employment income.

The couple also received EUR 37,546 in capital income which was not taxable in the Netherlands, only in Belgium.

Their total income for 2015 was EUR 157,546 (EUR 120,000 + EUR 37,547).

(2) Issue. The issue rested on whether X was entitled to deduct the mortgage interest.

(3) Decision. The Court analysed X's position under domestic law and EU law/*Schumacker* doctrine.

Domestic law

Under article 7.8. of the Individual Income Tax Act 2001 2001, a 'qualifying non-resident taxpayer' – who is a resident of the EEA, Switzerland or the BES Islands and whose worldwide income is taxed for 90% or more in the Netherlands - may be taxed as a resident on their Netherlands-source income. Consequently, they may deduct mortgage interest on their principal residence from their taxable income.

As only EUR 120,000/EUR 157,546 = 63% of X's income was taxable in the Netherlands, the 90% condition was not met. Accordingly, X was not entitled to mortgage interest relief under domestic law.

EU law/*Schumacker* doctrine

In line with *Schumacker* case law of the Court of Justice of the European Union (ECJ, *see* Note) – e.g. *X* (Case C-283/15) - the Court noted that the 'substantially all income' condition is not all-determining - i.e. the work state may be obliged to provide relief where less income is derived there. The question then becomes whether the taxpayer has 'enough' income in the residence state to make use of the relief there.

The issue in the case at hand is whether X has 'enough' income in Belgium i.e. whether (i) 'enough' should be calculated under the Dutch or Belgian rules; and (ii) all income or only employment income should be used to determine this.

Based on the *Wallentin* (Case C-169/03), the Court stated that the rules of the residence state should be used to determine if X has 'enough' income, and that there is no reason to include only employment income.

The Belgian income tax return contained the following items:

- EUR 58,409.69 in income including the net Dutch employment income that Belgium does not tax, and may not consider when determining entitlement relief for X in Belgium; and
- EUR 1,300 in taxable Belgian capital income. Almost all the Belgian capital income was subject to a final withholding tax (*bevrijdende voorheffing*) and was not included in the Belgian income tax return. This means that it could not be considered for determining the amount of available income for relief purposes.

As such, for purposes of the *Schumacker* doctrine, the Court determined that the Belgian taxable income for 2015 for X and his partner was EUR 1,300: the rest was either not taxable in Belgium or not available for calculating whether 'enough income' was available there.

This meant that X (and his partner) earned almost all their income (>99%) in the Netherlands and were therefore entitled to be taxed as qualifying non-resident taxpayers. Accordingly, they could deduct the mortgage interest from their taxable income.

The Court's decision of 24 April 2023 (published 10 May 2023) is available here (in Dutch only).

Note: In *Schumacker* (Case C-279/93), the ECJ determined that, in short, when a non-resident earns substantially all of his income in the Member State of his employment, it is that state (instead of the residence state) which must grant to the non-resident the same tax advantages that it provides for its residents for those circumstances.

Netherlands; Belgium - Dutch District Court Rules Belgian Resident Entitled to Mortgage Interest Relief Under Domestic Law, Schumacker Doctrine (12 May 2023), News IBFD.

Exported / Printed on 9 Mar. 2024 by hkermadi@deloitte.lu.