

Belgium

Ferenc Bollegeer

52nd AIJA Annual Congress

Prague, 26-30 August 2014

Questionnaire for National Reporters

Private Client and Immigration Working Session

**Movement of High Net Worth Individuals
Localisation et Délocalisation des Clients Privés Fortunés**

General Reporters/Rapporteurs généraux: Michael Wells-Greco (Speechly Bircham) and Firuza Ahmed (Kingsley Napley)

Background

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realities and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

1. PRELIMINARY MATTERS

We would ask that you return completed the Questionnaire and your answers to the case studies below by **Friday, 28 February 2014** (earlier if possible please).

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

If you are a delegate responding as part of the Immigration Commission, please respond **only** to sections 1.1 and 2.1.

1.1 Immigration and Nationality [for Immigration Commission only]

- 1.1.1 Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).
- 1.1.2 Are there any proposed changes to the programmes outlined in 1.1.1?
- 1.1.3 Is there a dichotomy between your Government's wish to attract HNWIs as against public perception of immigration?

1.2 Cross-border succession

- 1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(A) Yes

Belgium is a "Code Civil" jurisdiction. The right to determine in a will who inherits your estate has been established in our "Code Civil"/"Burgerlijk Wetboek" (national law applicable in every region of the Kingdom). The "Code Civil" aimed/aims to reconcile the objectives of the donor (testator) with the objectives of the protected heirs, such as the spouse and the children or the parents if the decuius has no children.

In the near future, the reserved portion of the estate may be decreased as there is a consensus that the objectives of the testator should (more) prevail than under current Belgian law.

- 1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?

(B) No

As the idea of the "Code Civil" was to protect some heirs (initially the children and other family members, since 1976 also (and prominently) the surviving spouse), it is not possible to waive your rights to a reserved share during the lifetime of the donor. The reluctance is based on the fear that some heirs might be forced during the lifetime of the donor to waive their rights to the benefit of others. During the lifetime of the donor, such a waiver is null and void.

However, once the donor died, it is possible (for the concerned heir) not to accept a legacy or inheritance or to accept the consequences of a waiver, drafted and agreed upon during the lifetime of the donor. The abovementioned fear is considered less relevant after the death of the donor as long as the concerned heir at that time agrees to accept the waiver.

1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.

(A) Yes

Belgium is not a party to the 1989 Hague Convention on succession. The Brussels IV regulation will apply in Belgium as from 17 August 2015.

Current Belgian Private International Law (PIL): choice of law is possible but limited to the law of the habitual residence of the donor or his/her national law, either at the time the will was drafted or at the time of death.

The choice of law rule in the Brussels IV regulation is identical.

However under current PIL, a choice of law cannot deprive a protected heir from his/her reserved share. This protection seems not available under Brussels IV.

If yes, is this election limited to the law of the deceased's:

(A) Nationality (B) Habitual Residence

1.3 Personal taxation and compliance

1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

Personal income tax (taxation of worldwide income) is only due by Belgian residents. Non-residents pay non-resident income tax on their Belgian income only (if no specific tax regime applies). The nationality of an individual is not relevant.

Inheritance tax is only due by the heirs of Belgian residents only. Heirs of a non-resident decedent pay a transfer tax when the non-resident owner of Belgian real estate dies. The same tariffs as for inheritance tax apply. The nationality of the decedent or the nationality or residence of the heirs is not relevant.

The concept of domicile is unknown in our jurisdiction.

1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?

(B) No

If yes, please briefly summarise the changes.

1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?

(A) Yes: reporting requirements aimed to tackle tax evasion

If yes, please briefly set out the key provisions.

I refer to Q 1.3.5.

1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?

(B) No, although there is a tendency to reduce benefits for (non)-resident expats

If yes, please briefly set out the key provisions.

1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?

(A) Yes:

If yes, please briefly set out the key measures.

- Art. 315 – Resident tax payers have (since many years) an obligation to declare the fact that they have foreign bank accounts (since 2013 the account number must also be provided as well as the fact that the taxpayer has a foreign insurance contract). As from 31 December 2013 and in accordance with the existing rule for bank accounts, the administration may request a copy of the documents with regard to these insurance contracts.
- Art. 317 (as from 10 January 2014) – A very broad “take-away right” of the tax administration. This covers the right to take-away (for further in depth investigation) the documents and books the tax administration verified (e.g. at the tax payer’s premises). These verifications may include the tax position of third parties (e.g. clients of a bank-taxpayer).
- Art. 322 – The Belgian Constitutional Court annulled the rule that there is no obligation for the Belgian tax authorities to inform the taxpayer of a request by a foreign tax administration to collect from Belgian financial institutions all information regarding the financial

position of this tax payer. As from 10 January 2014, there is no obligation to inform the taxpayer if the foreign tax administration informs its Belgian counterpart that its rights are in danger or that itself already informed the taxpayer.

- Art 344: general and broad anti abuse rule enabling the tax authority to requalify a transaction of the taxpayer if the main objective of the transaction is tax evasion: on the basis of objective factual elements the tax authorities may consider a transaction as abusive/artificial. As a consequence, it is up to the tax payer to prove his goal is not purely tax evasion (reverse of the burden of proof to the taxpayer). If the taxpayer cannot prove his/her non-tax goals the administration requalifies the transaction in the transaction that would have been the "most normal" one. A similar tax evasion rule applies in inheritance tax.

1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or "beneficiaries" located in your country?

(A) Yes

If yes, please briefly set out the key measures.

Art. 307, §1, al.4: "beneficial ownership" situations. Reporting requirement if taxpayer is "settlor" or (even merely potential) beneficiary of "structure".

1.4 **Mental capacity of adults**

1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

"Bewind": this is some kind of representation in the name and for the benefit of the protected person.

1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult's personal welfare and/or property and affairs?

(A) Personal welfare only (B) Property and affairs only (C) Both personal welfare and property and affairs

1.4.3 Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared? Yes, our country may recognize foreign incapacity rules.

1.4.4 Are there proposals for legislative change in the field of mental capacity?

(A) Yes (B) No

If yes, what are the proposals? Before, there were a lot of different incapacity regimes in Belgium (historically, not because of our complex Federal/regional regime). Recently these systems have been simplified and merged into one new regime ("Bewind")

1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?

(B) No

1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?

(B) No?

QUESTIONS FOR CASE STUDIES

2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

2.1 Immigration law [for Immigration Commission only]

2.1.1 Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWIs such as Roberta and Paul to:

- (a) move firstly to the US (please omit this if you do not advise on US immigration law);
- (b) and then secondly to your country?

If your advice would change if Paul was not a Dutch national, please explain.

- 2.1.2 What immigration options does Gloria have to move to your country on a long term basis?
- 2.1.3 What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?
- 2.1.4 Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?
- 2.1.5 Will any of the members of the family be able to acquire citizenship of your country?

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US\$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (**the Inheritance**).

If Roberta and Paul have a marital/matrimonial contract under Belgium law, they can opt for one of the regimes allowing that inherited assets are not becoming common/undivided property of the spouses. Belgium may accept such agreement under foreign law as well.

- Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.

Paul may opt to grant Roberta a special proxy (notarial) enabling Roberta to act solely as from the point in time where Paul would be affected by the disease.

2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

Luckily, a \$ 20.000.000 penthouse does (to my knowledge) not exist in Brussels, which offers consequently a lot of great real estate opportunities, as long as the climate is not too much of a burden 😊.

For the time being (it might change in the future), real estate taxes (property taxes) are relatively low in Belgium.

Considering these changes, the fact that inheritance tax is considerable (30% (27% in Flanders) for children) and the value of the asset, Paul and Roberta may opt for the acquisition of the asset by means of a foundation. No inheritance tax will be due upon their death. A foundation might also be the most appropriate structure for the artwork collections later on.

Alternatively they might opt to acquire only the usufruct of the Penthouse. The "property" (without usufruct) is acquired by the children. Upon death of Paul and Roberta no inheritance tax would be due by the children. However, the children are very young and this solution would deprive Roberta and Paul of the possibility to decide solely on the sale of the property.

To cope with this disadvantage, some kind of corporate structure may be envisaged.

It is important to note that the surviving spouse does not pay inheritance tax on his/her share in the marital abode.

2.3 Succession law and mental capacity

2.3.1 What would you advise with respect to the Inheritance? Organizing a conventional "bewind"/representation

2.3.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity? Special proxy (see above)

2.3.3 More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider? If Roberta would be the sole heir of the penthouse upon death of Paul, she might consider selling it and making a gift to their children (no tax or 3% tax rate).

If Paul would be the surviving spouse this issue needs to be taken into consideration prior to his incapacity.

3. QUESTIONS FOR CASE STUDY B

3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) “domiciled in a state of Australia”;
- Single;
- Commodities trader;
- Family wealth from mining opals;
- Bruce has an Aus\$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

3.2 Pre-arrival planning

3.2.1 What pre-arrival tax planning opportunities would you advise?

3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

3.3 Lifetime matters

3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

- (a) the most tax efficient way to make the inward investment?
- (b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?
- (c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

3.3.2 As to the unreported bank account:

- (a) what would you advise Bruce?
- (b) what are the Trustee's reporting obligations in your country? (see questionnaire)

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 Succession law

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

3.4.2 What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?

December 2013

Please return by email to:

Michael Wells-Greco
michael.wells-greco@speechlys.com
[for Private Client Commission Delegates]

Firuzah Ahmed
fahmed@kingsleynapley.co.uk
[for Immigration Commission Delegates]