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Abnormal or benevolent advantages in the non-profit sector

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INTRODUCTION

The non-profit sector does take up a more and more important place in the Belgian economic landscape . A study shows that in Belgium no less than 35.5% of total employment is provided for by the non-profit sector[1]. Divisions where the non-profit sector is especially present, are healthcare, welfare, the sociocultural sector, the social economy and education. The diversity of the divisions declares the diversity of the organizations active within the non-profit sector. On one hand, this explains the difficulty to describe the sector in detail, on the other hand the difficulty to feature the implications of new rules when they touch the non-profit sector.

With the entry into force the new Belgian Code of Companies and Associations, ASBLs (*Vereniging Zonder Winstoogmerk/Association Sans But Lucrative*) were allowed to undertake any economic activity that they deemed necessary for the realization of their disinterested purpose. The restrictions imposed by the Law of the 27th of June 1921 were removed[2]. Nevertheless, *carrying out a business exploitation or engage in transactions of a profitable nature* is the decisive factor for a Belgian legal entity to be submitted to the Corporate Income Tax. Being subject to the Corporate Income Tax (CIT) includes a whole different set of rules concerning the tax base, tax rate, tax collection than is used for the Legal Entities Income Tax (LEIT). The application of those rules can have important repercussions on entities.

The taxation of abnormal or benevolent advantages is an exception to the rule that enterprises can only be taxed on the profits they actually make and not on the profits they did not make[3]. This exception was drafted to provide the tax administration with a possibility to counteract certain manifestations of tax evasion and tax planning[4]. In the Belgian tax code, the provisions that refer to the abnormal or benevolent advantages are articles 26, 79 and 207 section 7 ITC.

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[1] https://statbel.fgov.be/sites/default/files/files/documents/NL_kerncijfers_2020.pdf

[2] Law of the 21st of June 1921 betreffende de verenigingen zonder winstoogmerk, de stichtingen en de Europese politieke partijen en stichtingen, *BS* 01-07-1921.

[3] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 142-150.

[4] L. DEKLERCK, *Manuel pratique d'impôt des sociétés*, Bruxelles, Larcier, 2020, 176-188.

In this master's thesis, the question concerning the effect of the articles 26, 79 and 207 section 7 ITC on the actors in the non-profit sector will be elaborated. To start, an attempt is made to outline de Belgian non-profit sector. Secondly, the different tax regimes applicable to the organizations active in the non-profit sector will be covered. In a third section, the articles 26, 79 and 207 section 7 ITC will be explained. Consequently, the adjustments arising from abnormal or benevolent advantage provisions will be applied to the LEIT regime. Finally, the rules concerning abnormal or benevolent advantages will be used in specific situations.

1 CONCEPT OF "NON-PROFIT SECTOR"

1.1 WIDE VARIETY OF DEFINITIONS

Giving a definition of the non-profit sector is an important starting point in the development of this masters' thesis. The non-profit sector is very heterogeneous. To define this concept, organizations, states, researchers, … use different criteria. Nevertheless, the importance of a clear definition of the sector was put forward by, among others, Lester M. Salamon and Helmut K. Anheier of the John Hopkins University[5]. According to them the most productive definition of the non-profit sector is the structural-operational definition is. Hereby, the non-profit sector is defined by using five key features. Those features are put forward by the Local Associates on the Johns Hopkins Comparative Non-profit Sector Project[6]. Using those features, the non-profit sector is defined as formal[7], private[8], non-profit-distributing[9], self-governing[10] and voluntary[11]. Even though this definition of the non-profit sector is often referred to, the utility of the definition can be criticized. For example, in a later study the structural-operational

[5] L.M. SALAMON and H.K. ANHEIER, "In search of the non-profit sector. I: The question of definitions", *Voluntas* 1992, Vol 3 (2), 125-151.

[6] *Ibid.*, 134-135.

[7] The organization has to be institutionalized in some way.

[8] The organization has to be, institutionally speaking, separate from the government.

[9] Non-profit organizations may accumulate profits in a given year, but the profits must be ploughed back into the basic mission of the agency. They cannot distribute those profits to their owners or directors.

[10] The organization has to dispose of their own rules and decision-making bodies.

[11] To some extent, the organization has to operate on voluntary participation.

definition is applied to historical cases[12]. Following this application of the structural-operational definition, the researchers conclude that the description of the non-profit sector is too limited. Certain organizations, that should fall within the non-profit sector, are excluded because of some of the used key features. This criticism did not prevent later work from referring primarily to this definition and those criteria.

There are as well definitions of non-profit organizations to be found. For example in the tax glossary of the IBFD a non-profit organization is defined as "an organization whose primary purpose is something other than to make a profit"[13]. Furthermore, the tax glossary insists on the special tax status that non-profit organizations in many countries enjoy which may take the form of exemptions from (corporate) income tax, death duties and gift tax, … or certain gifts to such organizations that may be deductible for income tax purposes[14]. This definition shows the link that exists between being part of the non-profit sector and the fiscal treatment that some organizations hold. In Belgium as well, certain tax advantages are provided for non-profit organizations by subjecting them to the legal entities tax regime. This will be partially elaborated in what follows.

The European Union as well attempts to provide for a framework for non-profit organizations in order to make it possible for those organisations to circulate easily between the different member states[15]. In a study prior to the proposal, it is yet again confirmed that the non-profit sector consists of a wide variety of organizations and that every state has its own specification in this regard. Nevertheless, the study was capable to distinguish associations, corporations and

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[12] S. MORRIS, "Defining the Nonprofit Sector: Some Lessons from History", *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 2000, vol 11, 25-43.

[13]J. ROGERS-GLABUSH, *IBFD international tax glossary. Seventh revised edition*, Amsterdam, IBFD, 2015, 331: nonprofit organisation.

[14] *Ibid*.

[15] Res. EP nr. 2020/2026, 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations.

foundations as three basic types of non-profit organizations[16]. Those types of organizations play in a similar manner a role in the Belgian non-profit sector.

Those international endeavours to narrow down the non-profit sector and its actors are a useful source to describe how our Belgian non-profit sector is constructed.

1.2 THE NON-PROFIT SECTOR IN BELGIUM

One of the reasons why it is difficult to outline the non-profit sector is because states have different ideas, based on their specific socio-economic state, of what the non-profit sector contains. Furthermore, there are various terms used to describe the non-profit sector. All those terms tend to focus on different aspects. For example, in Belgium, a synonym used to describe the non-profit sector is the *quartiare sector* which is largely similar to the non-profit sector but includes certain differences[17]. According to J. PACOLET the term is used to distinguish the quartiare sector from the market sector and includes clearly private entities as well as public entities[18]. The fact that public entities as well as private entities are included in the definition of the non-profit sector is an element that is specific for the Belgian non-profit sector. At the beginning of the twenty-first century, following the study of the John Hopkins University, the 'Koning Boudewijn stichting (la Fondation Roi Baudouin)' ordered a study to describe the exact scope of the Belgian non-profit sector[19]. This result is used to outline the non-profit sector for a further use in this master's thesis.

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[16] K. MÜLLER and M. FERNANDES, "A statute for European cross-border associations and non-profit organisations", *European added value assessment* May 2021, 2.

[17] J. PACOLET, *De tewerkstelling in de quartaire sector in België*, Leuven, Katholieke Universiteit Leuven. Hoger instituut voor de arbeid, 2002, 8.

[18] *Ibid.*, 3-6.

[19] KONING BOUDEWIJNSTICHTING, *Syntheserapport: De non-profitsector in België socio-economisch overzicht*, s.l., Koning Boudewijnstichting and M. MARÉE en S. MERTENS DE WILMARS, *Contours et statistiques du non-marchand en Belgique*, s.l., Editions de l'Université de Liège, 2002.

Put simply, one can say that the non-profit sector is formed by organizations whose economic activities are not market-based[20]. This implies that it is necessary to determine whether an activity is market-based or not. The study distinguishes three different approaches to arrive at such a conclusion. The first one is by looking at the resources the entity disposes of. When the activity is intentionally used to cover the cost of production by a price or product of the sale, the activity is considered market based. This can be defined as *not seeking to increase the value of the production by means of a price in relation to the cost, and which therefore ensures the functioning through the use of non-market resources*[21]. This approach is called the technical approach or the resources approach. The second approach is the normative approach. This implies that an organization is qualified as market-based because it is present on the market in order to maximize its profit[22]. The pragmatic approach is the third approach. According to this approach a distinction is made based on the type of goods and services exchanged on the market[23]. Nevertheless, because entities often exercise more than one activity and it is difficult to determine the main activity, this third approach is not suitable for decisive factor of whether an activity is market based or not[24]. To arrive at a clear and correct definition, it is necessary to combine the different approaches[25]. This results in the following theoretical definition: an organization will be considered as being part of the non-profit sector when it's financed by other resources than sales to cover the costs of production and it is not motivated by making profits ('non-profit')[26].

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[20] M. MARÉE and S. MERTENS DE WILMARS, *Contours et statistiques du non-marchand en Belgique*, Editions de l'Université de Liège, 2002, 9.

[21] M. MARÉE and S. MERTENS DE WILMARS, *Contours et statistiques du non-marchand en Belgique*, Editions de l'Université de Liège, 2002, 9.

[22] *Ibid.*, 11.

[23] *Ibid.*, 13.

[24] *Ibid.*, 14.

[25] *Ibid.*, 15.

[26] *Ibid.*, 18.

To make the theoretical definition practically applicable, it has to be completed with certain criteria such as the legal form used by the organization[27]. The organization form in combination with the method of financing is what is used to prepare the satellite accounts[28] in Flanders[29]. For example, the National Social Security Office (RSZ or ONSS) has withheld a list of private entities to determine whether an entity is part of the private non-profit sector or not[30]. With regard to the public non-profit sector, some recent studies do not consider the public non-profit sector to be separate from the public sector and treat them as one and the same. In some other studies, it is possible to find the public non-profit sector distinctively from the public for profit sector.

2 TAX REGIME APPLICABLE TO NON-PROFIT ORGANIZATIONS

Considering the variety of entities active in the non-profit sector, the tax treatment of those organizations is multifaced as well. In fact, Belgian non-profit organizations can be taxed under the corporate income tax (CIT) as well as the legal income tax (LEIT). The tax regime applicable to foreign non-profit organizations (non-resident tax) as well as the taxation of factual associations fall outside the scope of this master's thesis. Under this title, the CIT and the LEIT with their conditions and implications for non-profit organizations will be elaborated.

2.1 CORPORATE INCOME TAX REGIME (CIT)

The corporate income tax regime is designed to tax corporations that are a resident of Belgium. This is determined by article 179 ITC. In Belgian law there are many ways to define corporation. Nevertheless, there is a specific definition of a corporation applicable for the ITC to be found in article 2, §1, 5° ITC. This article defines a corporation as an organism with legal

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[27] M. MARÉE and S. MERTENS DE WILMARS, *Contours et statistiques du non-marchand en Belgique*, Editions de l'Université de Liège, 2002, 21.

[28] A satellite account an economic information system that allows to estimate the impact of a sector on the economy as a whole. Those satellite accounts are used to identify the nonprofit sector because national accounts fail to provide the desired detail (see: https://www.vlaanderen.be/publicaties/onderzoek-naar-een-satellietrekening-voor-cultuur)

[29] L. DE SMEDT and J. PACOLET, *Financiering Van De Vlaamse Social Profit. Een Nieuwe Satellietrekening Voor De Socialprofitsector in Vlaanderen.*, Leuven, HIVA - KU Leuven, 2020, 299.

[30] *Ibid.*,70.

personality that carries out a business exploitation or a lucrative activity. Consequently, one can distinguish three criteria to determine whether an organism is considered to be a resident corporation according to the ITC and as such submitted to the CIT.

2.1.1 CONDITIONS

The first criterium is the legal personality. Organisms without legal personality cannot be submitted to the CIT. The second criterium is the residency. Non-resident corporations will be submitted to the non-resident taxation[31]. According to the third criterium, to be a corporation, the organism needs to carry out a business exploitation or is engaged in transactions of a profitable nature. As will be specified in a later part of this master's thesis, this criterium determines whether or not certain non-profit organizations are submitted to the CIT or the LEIT.

2.1.1.1 Legal personality

Legal personality is accorded to an entity when the assets of that entity are wholly or partially segregated from other assets for the benefit of creditors and/or contributors to those assets[32]. The assets need to be linked to a lasting and pursued separate interest [33].

Whether or not an entity disposes of legal personality is determined by the law of the country under which law the entity is established. This principle of statutory seat was introduced in Belgian company law by the law of the 23rd of Mars 2019 which caused a big reform in the Belgian company law[34]. Nevertheless, as a consequent of the real seat theory that is applicable in Belgian tax law[35], it is possible that foreign law needs to be consulted to determine the presence of legal personality[36]. This is the case when an entity is considered to be a resident of Belgium, which implies the possibility to be submitted to the CIT, and the entity is established

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[31] See articles 227 et seq.

[32] H. BRAECKMANS and R. HOUBEN, *Handboek vennootschapsrecht (tweede uitgave)*, Morstel, Intersentia, 2021, 21.

[33] *Ibid.*

[34] Law of the 23th of Mars 2019 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen, *BS* 04-04-2019.

[35] See articles 2, §1, 5°, b) and ITC'92.

[36] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 2-3.

under the law of a foreign country[37]. Article 2, §1, 5°, a), first and second intent ITC'92 specifies that in this case the entity will be considered to dispose of legal personality, for the application of the Belgian tax law, if the foreign law under which the entity is established accords legal personality to the entity. When the foreign law does not accord legal personality to the entity but the entity is founded under a legal form comparable to an entity established under Belgian law which does have legal personality according to Belgian law, the presence of the legal personality will be accepted[38].

2.1.1.2 Residency

According to Belgian tax law, to be subject to CIT one needs to be resident of Belgium. To be a resident company, the entity needs to have its main establishment or actual management in Belgium[39]. The ITC provides a rebuttable presumption of residency when the registered office is located in Belgium[40]. The presumption can only be rebutted when it has been demonstrated that the company is a resident of the other state according to the law of that state[41].

2.1.1.3 Carrying out a business exploitation or engage in transactions of a profitable nature

The third condition that determines whether an entity is submitted to the CIT is the necessity of 'carrying out a business exploitation or engage in transactions of a profitable nature'. This condition demands a factual assessment[42]. 'Carrying out a business exploitation' needs to be interpreted as 'operating an industrial, commercial or agricultural enterprise'[43]. The Court of Cassation did define the notion as every activity which is aimed at producing or trading goods

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[37] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 2-3.

[38] Article 2, §1, 5°, a), second intent ITC.

[39] Article 2, §1, 5°, b) ITC.

[40] Article 2, §1, 5°, b) section 2 ITC.

[41] Article 2, §1, 5°, b) section 2 ITC.

[42] L. DEKLERCK, *Manuel pratique d'impôt des sociétés*, Bruxelles, Larcier, 2020, 31.

[43] *Com.IB* 179/10.

or providing services[44]. The notion refers to the methods used by the entity to carry out the business activity[45]. If the business activity was carried out by a natural person, it would give rise to would give rise to taxable profits (*winsten/bénéfices*)[46]. According to the Court of Cassation the exploitation must be intended to be effective and current and includes the entirety of the professional activity devoted to the regular performance of the operations necessary to maintain that activity to a degree consistent a normal exercise[47] .

'Engaging in transactions of a profitable nature' can be explained as carrying out gainful activities with or without pursuing profit[48]. The administrative commentary refers in the first case to articles 23, § 1, 2° and 27 ITC'92 which implies that if the activities (with pursue of profit) were carried out by a natural person, it would give rise to would give rise to taxable benefits (*baten/profits*)[49]. In the second case the commentary specifies that the operations of an industrial, commercial or agricultural nature have to be repetitive to the point of constituting an 'occupation' or the activity needs to include the use of industrial or commercial methods[50].

As can be deducted from the commentary above and as is confirmed by the Court of Cassation, an entity does not need to have a pursue profit to be submitted to the CIT[51]. This clarification was necessary and implied a switch from a subjective tax regime that takes into account the pursue of profit to the objectification of the regime which looks at the nature of the operations carried out[52].

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[44] Cass. the 14th of June 1991, AR F 1885 N.

[45] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER en A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 57.

[46] *Ibid.*

[47] Cass. the 14th of January 2011, AR F090140N, *Arr.Cass.* 2011, n° 1, 190. See S. VAN CROMBRUGGE, "VZW en vennootschapsbelasting : geen winstoogmerk vereist ?", *Fiscoloog* 2011, n° 1248, 8.

[48] *Com.IB* 179/11.

[49] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 59.

[50] *Com.IB* 179/11.

[51] Cass. the 14th of January 2011, AR F090140N, *Arr.Cass.* 2011, n°1, 189.

[52] *Com.IB* 179/12.

2.1.2 IMPLICATIONS

Entities subject to the CIT will be taxable in Belgium on the income they receive whether the income derives from Belgium or abroad[53]. Furthermore, all the income obtained by the entity will, according to article 183 ITC, be regarded as profits. Which implies that not only the products of profit-making operations are included but also the contributions, donations and subsidies received and proceeds from invested funds and of all other operations[54]. Article 183 ITC specifies that the rules concerning personal income are applicable to those profits to the extend that there are no exceptions or deviations provided in the articles 179 to 219*quinquies* ITC.

Because it is clearly established that the absence of a profit motive (*winstoogmerk/but de lucre*) does not prevent an entity to be subject to the CIT and following article 183 ITC, it is possible that the rules concerning abnormal and benevolent advantage are applicable to entities active in the non-profit sector.

2.2 LEGAL ENTITIES INCOME TAX REGIME (LEIT)

The second tax regime elaborated in this master's thesis is the legal entities income tax regime (LEIT). Regarding the entities that are subject to the regime, the income that is taxable and the way the income is taxed, the regime is differently constructed than the CIT. This implies that an entity subject to the LEIT will be taxed differently than an entity subject to the CIT. First of all, the rules concerning the scope *ratione personae* of the LEIT will be elaborated. Secondly, the implications of the subjection to the LEIT in comparison to the CIT will be commented.

2.2.1 GENERAL

As determined by article 220 ITC, there are four different categories of entities that are submitted to the LEIT. Those categories are the result of multiple adaptions based on the idea of the legislator that certain groups should be favoured by means of being subject to corporate income tax.

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[53] Cass. the 29th of June 1984, AR F 1155 N, *Arr.Cass*. 1984, 1423 See: L. DEKLERCK, *Manuel pratique d'impôt des sociétés*, Bruxelles, Larcier, 2020, 63.

[54] H. LOUVEAUX, *Fiscalité du secteur non marchand, 2e édition*, Bruxelles, Larcier, 2010, 50.

The first category mainly concerns public authorities such as the State, the Communities, the Regions, the provinces, the agglomerations, the federations of municipalities, the public centra of social welfare, the public church institutions, the assistance zones, the police zones and the polders and waterways.[55] The questions arises whether those entities are part of the non-profit sector. As is established in the first chapter, the Belgian non-profit sector includes the public non-profit sector as well to the extent that the conditions are fulfilled. Nevertheless, even though in general there is a Belgian non-profit sector, in the recent applications, the public non-profit sector is not considered separate from the public sector[56].

The second category references to the entities that are excluded from the CIT by article 180 ITC.[57] In this article there are some specific organizations enlisted. The list includes: Office National du Ducroire, Société Nationale de Crédit à l'Industrie, etc. In the same list are included: intercommunales, partnerships, project associations, autonomous municipal companies and associations that are all active as hospitals or institutions that assist war victims, the disabled, the elderly, protected minors or the needy. To the extent that those organizations fulfil the conditions that are laid down to define the non-profit sector, they are part of it.

Entities of the non-profit sector primarily fall within the scope of the LEIT based on the third category. As for the application of the CIT, article 220, 3° ITC demands entities to possess legal personality and be a resident of Belgium. Contrary to the application of the CIT, entities that do not operate a business or engage in transactions of a profitable nature are subject to the LEIT. Nevertheless, when an entity does operate a business or engage in transactions of a profitable nature and consequently should be subject to the CIT, there are two sets of exceptions possibly applicable. One regarding certain privileged areas and the other regarding certain privileged operations. Those exceptions will hereafter be elaborated in detail.

The exceptions described in articles 181 and 182 ITC are only open to entities that do not pursue profit. The 'pursue of profit' can be described as seeking *to obtain, directly or indirectly, a*

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[55] Article 220, 1° ITC.

[56] L. DE SMEDT and J. PACOLET, *Financiering Van De Vlaamse Social Profit. Een Nieuwe Satellietrekening Voor De Socialprofitsector in Vlaanderen.*, Leuven, HIVA - KU Leuven, 2020.

[57] Article 220, 2° ITC

material gain, immediate or deferred, for the shareholders or partners of the entity[58]. This interdiction to confer an advantage includes every direct advantage that increases the assets of the partners such as a dividend.[59] When looking at the indirect advantage, doctrine indicates that the fiscal interdiction of the pursue of profit does not prevent an entity from distributing an indirect advantage[60].

2.2.2 ARTICLE 181 ITC: "PRIVILEGED" AREAS

The legislator has privileged certain specific sectors to 'benefit' from the LEIT. Those sectors are described in article 181 ITC. At the time being the legislator saw it fit to favour certain sectors because of their interest for the community[61]. As mentioned above, to fall within the scope of article 181 ITC, the entity cannot pursue profit. The privileged areas enlisted in the article include providing or supporting education, the organization of trade fairs or exhibitions, the competent institutions of the Communities as a service for family and are recognized as family and elderly care services, etc. Even though not mentioned in article 181 ITC, hospitals that are organized as an ASBL or another legal person can fall within the scope[62]. The legislator confirmed that an enterprise with the activity of a hospital established as an ASBL has always been able to enjoy the legal entities tax[63].The question arose because hospitals organized as intercommunals and other public entities are exempted from the CIT (article 180, 1° ITC).

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[58] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER en A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 62.

[59] *Ibid.*, 63.

[60] An indirect advantage is described as a fee waiver such as a cost saving see: S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 63.

[61] *Parl.St.* Kamer 1975-1976, n°. 879, 16-17.

[62] S. GARROY, "Les intercommunales et les impôts sur les revenus : une valse fiscale à deux temps", *ASBL Actualités* 2017, 5.

[63] *Parl.St*. Kamer 2014-2015, n° 1125/13, 19.

To benefit from article 181 ITC, it is not sufficient that the entity is active in the given sector. The entity needs to be mainly or exclusively active in one of the privileged sectors[64]. To determine whether this is the case, there are two primary methods used: the comparison of resources and the accreditation system[65].

2.2.3 ARTICLE 182 ITC: "privileged" operations

The legal entity that does not pursue any profit but that engages in transactions of a profit-making nature can be exempted from the CIT when the operations of a profit-making nature are exercised by the entity under certain circumstances. Article 182 ITC distinguishes three different circumstances that allow an entity to be submitted to the LEIT. Those circumstances include carrying out: isolated or exceptional operations, operations that consist of the investment of funds collected in the exercise of their statutory mission, operations that only incidentally involve industrial, commercial or agricultural methods or operations that do not engage in the use of industrial or commercial methods.

If an entity only engages in transactions of a profit-making nature in isolated or exceptional cases, the entity shall not be submitted to the CIT. According to the administration, the reason for this exception is that those operations are not frequently enough repeated to be considered an 'occupation'[66]. According to case law, it does not suffice that an event is organized once a year to fall within the scope of isolated or exceptional transactions because large events organized once year demand a whole year preparation[67]. Every case demands a factual assessment.

With concern to the second situation when an entity enters the area of a privileged operation, the administration states that the investing funds collected under the statutory mission concerns

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[64] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER en A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 67.

[65] For a further explication of those methods see: S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 68- 70.

[66] *Com. IB* 92, n° 182/2.

[67] Cass. the 14th of January 2011, AR F090140N, *Arr.Cass.* 2011, n° 1, 187.

of movable or immovable investment transactions which would be deemed to form part of the normal management of private assets if they were carried out by natural persons or by associations, etc. without legal personality[68].

The third situation concerns a non-profit entity that incidentally uses industrial, commercial or agricultural methods or does not uses industrial, commercial or agricultural methods at all. A first question that came up in this situation is whether or not the rule consists of an alternative 'escape clause'. Namely if it suffices for an entity to fall within the conditions of 'incidentally using industrial, commercial or agricultural methods' or of 'not engaging in operations that make use of industrial or commercial methods'. The doctrine and case law both are divided regarding this proposition[69]. A second question arose in concern to the assessment of the criteria in practice. To evaluate incidental use, the administration did provide some tools. The first one concerns the correlation criterion, which states that disinterested main activity is simply impossible without the pursuit of the concerned business[70]. The second quantitative criterion is a comparison between the number of people deployed and the importance of the material resources used, used on the one hand from the professional activity performed and, on the other hand, from the selfless activity[71]. S. GARROY and X. GÉRARD note that only the objective criteria provided for by the law itself should be used to determine the tax regime of a legal entity and that the criteria as mentioned above should not be used as decisive criteria[72]. As mentioned, an entity can as well try to prove that it does not implement industrial or commercial methods. The administration clarifies that the notion implies operating in a manner usually followed in a particular sector by industrial or commercial enterprises[73]. Which is more, the administration

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[68] *Com. IB 92*, n° 182/3.

[69] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 85.

[70] *Com. IB* 92, n° 182/11.

[71] *Com. IB* 92, n° 182/12-14.

[72] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, *La fiscalité des ASBL et du secteur non marchand.*, Wavre, Limal: Anthemis, 2020, 90.

[73] *Com. IB* 92, n° 182/8.

provides an exemplative lists of assessment criteria such as the way advertising is conducted, the sales and distribution methods used, the nature of the income obtained etc[74].

2.2.4 IMPLICATIONS

The tax regime to which a non-profit entity is subject to, has important repercussions on the income that is taxable and the way it is taxed. Contrary to the taxation under the CIT, only some income, mentioned in articles 221-224 ITC is taxable under the LEIT. It consists mostly of movable and immovable income. The articles that are explicitly applicable to a given entity are determined by the category, summed up in article 220 ITC, caused the entity to be subject to the LEIT. Specific to the LEIT is the fact that income from gainful activities of a commercial or industrial nature is exempted from taxation. A paradoxical consequence from this exemption is that it penalized associations that do not engage in profit-making[75]. Even though, according to the legislator as well, this regime should constitute an advantage for the entities subject to it[76].

3 SCOPE OF THE TERM "ABNORMAL OR BENEVOLENT ADVANTAGE" AND LEGAL BACKGROUND IN BELGIAN (TAX) LAW

3.1 ABNORMAL OR BENEVOLENT ADVANTAGE

Abnormal or benevolent advantages are not defined in Belgian tax law[77]. This implies that one has to look into jurisprudence as well as into comprehensive legal doctrine to capture the meaning of the notion. The administration did define an advantage as the enrichment of the

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[74] *Com. IB* 92, n° 182/9.

[75] T. AFSCHRIFT, « Les a.s.b.l. exerçant une activité économique et le droit fiscal », in Les a.s.b.l., évaluation critique d'un succès, C.R.D.V.A., Gand, Story-Scientia, 1985, n° 16, 453 see: X. GÉRARD and S. GARROY, "Régime fiscal des ASBL sous l'empire du Code des sociétés et des associations" in L. HERVE and I. RICHELLE (eds.), Incidences fiscales de la réforme du droit des sociétés, Bruxelles, Larcier, 2019, (81) 130.

[76] See for example: *Parl.St*. Kamer 2014-2015, n° 1125/13, 19.

[77] P. CAUWENBERGH and A. GAUBLOMME, "Arms' length transacties en de vraag naar de toepassing van de artikelen 79 en 207 WIB", *TFR* 2005/14, n° 286, 707-709.

recipient without having to provide a (equal) quid pro quo[78]. This means, as clarified by the Appeals Court of Antwerp, that an advantage requires an enrichment of the acquirer and, as far as the provider of the benefit is concerned, no effective compensation equivalent to the benefit is provided[79]. In other words, two conditions need to be fulfilled before one can speak of an advantage: the enrichment of the beneficiary of the operation and the lack of effective compensation[80].

In addition, an advantage is abnormal when it is contrary to the ordinary course of business and the established rules and customs[81]. For example, it is unusual for independent parties to provide services/goods to each other below market price[82]. The determination of whether an advantage is abnormal involves a factual appreciation. In which case, global balances at the group level, particular characteristics of the group relationship and normal intra-group solidarity are considered[83]. The notion of an abnormal advantage is often associated with the *arm's length principle*. Because, to determine whether an advantage is abnormal, one can attempt to verify if the advantage would have been granted if the parties were independent. The verification needs to take in consideration the prevailing commercial customs and of the prevailing economic conditions[84].

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[78] *Com.IB* 1992, nr. 26/16.

[79] Antwerpen the 13th of May 1991, FJF 1991, 319.

[80] S. HUYSMAN, "De toepassing van artikel 79 W.I.B. 1992 op fusieverrichtingen", *TRV* 1994, 19.

[81] S. HUYSMAN, "De toepassing van artikel 79 W.I.B. 1992 op fusieverrichtingen", *TRV* 1994, 24.

[82] *Com.IB* 1992, nr. 26/17.

[83] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 142-150.

[84] Bergen the 1st of Mars 1978, JDF 1978, 227.

A benefit is benevolent when the provider of the benefit provided the benefit without the purpose of fulfilling an obligation or without any countervalue[85]. This notion can be considered redundant because gratuitous advantages are abnormal benefits as well[86].

3.2 LEGAL BACKGROUND

There are three different articles in Belgian tax law that refer to abnormal or benevolent advantages. Article 26 ITC is applicable to the provider of an abnormal or benevolent advantage and the others, articles 79 ITC and article 207 section 7 ITC, concern the beneficiary of the abnormal or benevolent advantage. Articles 26, 79, (185, § 2), et 207 section 7 ITC are put in place to reduce the risk of profit shifting which occurs in enterprise groups[87]. By artificially inflating costs or foregoing potential profits enterprises can shift their profits to the countries where the tax burden is lower. This way, states miss out on tax revenue. Those articles, even though not specifically constructed for it, can have repercussions in the non-profit sector.

3.2.1 ABNORMAL OR BENEVOLENT ADVANTAGE AND THE PROVIDER OF THE ADVANTAGE

Article 26 ITC starts with the general principle that when the conditions of abnormal or benevolent advantages (as described above) are fulfilled, the advantage shall be added to the profits of the enterprise. According to the ITC, article 26 is an article that determines the profit of enterprises for the purposes of income tax.

Ratione personae, article 26 ITC is applicable to enterprises established in Belgium that grant abnormal or benevolent advantages. To fall within the scope of the article, the enterprise must be able to obtain profits (*winsten/bénéfices*). This implies that holders of liberal professions (*baten/profits*) are not envisaged nor are the natural personals that obtain a revenue when

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[85] *Com.IB* 1992, nr. 26/16 see Cass. the 31th of Oktober 1979, REGENTS PARK LAND C° (BELGIUM) N.V., *Arr.Cass*. 1979-1980, 278.

[86] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 144.

[87] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 166.

managing their private assets. Consequently, for entities that are submitted to the LEIT neither an abnormal nor benevolent advantage can be granted because they cannot obtain profits [88]. In terms of the receiving person, the relation between this person and the granter of the advantage is not taken in consideration neither is the fact of this person is a natural or a legal person or whether he is established in Belgium or not[89].

In the past, there was some confusion between the applicability of article 26 ITC and article 49 ITC. Article 49 ITC prevents the deduction of costs when they did not incur in the taxable period or are not borne in order to obtain or maintain the taxable income. The authenticity and the amount of costs need to be justified by supporting documents. When abnormal or benevolent advantages concern the artificial inflation of costs, those costs are not deductible under article 49 ITC[90]. When the deduction of those costs is refused and article 26 ITC is applicable, it is possible that double economic taxation arises. Since article 26 ITC indicates that the advantage is not added to the profits of the enterprise when it is into account in determining the taxable income of the transferee, the question raised whether the refusal of the deduction suffices to benefit from the escape clause (see chapter 4)[91]. In the jurisprudence, various courts considered that the prohibition on double taxation is applicable when article 49 ITC is invoked[92]. This same reasoning was to be found in the doctrine as well[93]. Nevertheless,

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[88] S. GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 388.

[89] *Com.IB* 1992, nr. 26/13.

[90] L. PLAS, "Aanvaardt Minister dan toch economische dubbele belasting ?", Fiscoloog 1995, n°530, 7.

[91] S. VAN CROMBRUGGE, "Art. 26 versus 49 W.I.B. 1992 op het vlak van dubbele belasting", *Fiscoloog* 2006, afl. 1031, 1.

[92] Antwerpen the 7th of Mars 2006, FJF 2006; Gent the 14th of April 2004, TRV 2004, 231; Rb. Brugge the 21th of June 2005, Fiscale Koerier 2005; Rb. Liège the 11th of Oktober 2004, TFR 2005, 656. See: S. VAN CROMBRUGGE, "Art. 26 versus 49 W.I.B. 1992 op het vlak van dubbele belasting", *Fiscoloog* 2006, n°. 1031, 1.

[93] S. VAN CROMBRUGGE, "Art. 26 versus 49 W.I.B. 1992 op het vlak van dubbele belasting", *Fiscoloog* 2006, n°, 1.

the Court of Cassation refused the reasoning by two judgements[94]. Eventually the legislator intervened by adding 'without prejudice of article 49 ITC' to article 26 ITC[95].

3.2.2 ABNORMAL OR BENEVOLENT ADVANTAGE AND THE BENEFICIENT OF THE ADVANTAGE

The legislator did introduce certain measures to prevent the recipient of the abnormal and benevolent to undertake certain deduction from the advantage that it received.

Article 79 ITC states that *occupational losses shall not be deducted from that part of the profits or gains which arises from abnormal or benevolent advantages obtained by the taxpayer, in any form or by any means, directly or indirectly, from an enterprise with respect to which he is, directly or indirectly, in any relationship of mutual dependence.*

To define 'any relationship of mutual dependence', the administrative commentary references to the definition laid down in the commentary concerning article 26 ITC[96]. The purpose of this article is to prevent a prosperous company or an industrialist with significant profits to take control of an enterprise whose existence is threatened by losses and transfers to this enterprise, by various means (in particular purchases at excessive prices or sales at bargain prices), as much profit as possible[97]. That profit can be absorbed by the enterprise by the losses of the taxable period and previous taxable period[98].

Article 207 section 7 ITC enlarges this interdiction to the CIT and states that certain deductions cannot be approved when the recipient of abnormal and benevolent advantages wants to deduct them from the profits which arise from the abnormal or benevolent advantages.

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[94] Cass. the 30th of Oktober 2008 and Cass. the 12th of June 2009.

[95] C. BUYSSE, "Cassatie : geen 'doorwerking' van art. 26 op art. 49", *Fiscoloog* 2009, n°. 1178, 11.

[96] *Com.IB* 1992, nr. 79/9.

[97] *Com.IB* 1992, nr. 79/1.

[98] *Com.IB* 1992, nr. 79/1.

4 THE APPLICABILITY OF THE ESCAPE CLAUSE UNDER THE LEIT REGIME

If the conditions are fulfilled and the tax administration considers that a Belgian enterprise has granted an abnormal or benevolent advantage to another enterprise, there is an important escape clause that prevents the advantage from being added to the profits of the provider of the advantage. This escape clause states that if the advantage is taken into to account when determining the taxable income of the receiver of the advantage, the advantage does not need to be added to the profits of the provider. '*Taken into account when determining the taxable income*' does not imply that the advantage is effectively taxed[99]. The purpose of this addition was to specifically enlarge the applicability of article 26 ITC to the situation where a Belgian enterprise grants an abnormal and benevolent advantage to another legal or natural person that is established in Belgium[100]. It is often considered that when an abnormal or benevolent advantage is attributed to a beneficiary subject to the Belgian CIT, the advantage is taken into account[101]. Nevertheless, in case an entity is subject to the LEIT, the advantage is not taken into account to determine the taxable income of the beneficiary of the advantage because the articles 26, 79, 207 section 7 ITC are not applicable in the LEIT[102].

Nevertheless, there are certain situations in which the escape clause is not applicable even when the advantage is taken into account when determining the taxable income of the beneficiary. Article 26 ITC sums up three specific situations. All concern a cross-border situation because of the risk of profit shifting. The reason therefor is that if the taxpayer could prove that the advantage was taken into account to determine the taxable income of a person abroad, the escape clause was applicable[103]. To prevent missing out on taxing those advantages, the different situations were added to article 26 ITC.

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[99] I. VAN DE WOESTEYNE, *Handboek vennootschapsbelasting 2021-2022*, Antwerpen, Intersentia, 2021, 144.

[100] *Parl.St.* Senaat 89-1990, n° 806/3, 64.

[101] Question and Answer., Senaat, n° 35, 12th of January 1990,1640; X,o.c., 1990, 462-463 see: B. PEETERS and P. CAUWENBERGH, "Indirecte winstverschuivingen binnen multinationale vennootschapsgroepen: ontwikkelingen sinds de Wet van 28 juli 1992", *AFT* 1993, 164.

[102] GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 388.

[103] B. PEETERS and P. CAUWENBERGH, "Indirecte winstverschuivingen binnen multinationale vennootschapsgroepen: ontwikkelingen sinds de Wet van 28 juli 1992", *AFT* 1993, 165.

The first situation concerns an abnormal or benevolent advantage that is granted to a taxpayer who is not established in Belgium and with whom the provider of the advantage is directly or indirectly, in any relationship of mutual dependence[104]. Concerning the mutual dependence, the commentary of the administration specifies that the identification thereof is the consequence of a factual analysis[105]. Different elements can be put forward to proof the mutual dependence. Therefor the administration refers to the capitals, the raw materials and product of which the other enterprise has the monopoly (in fact or in law), the close technical cooperation or the guarantees provided by the other enterprise and the close family relationships between the operators[106].

The second situation concerns an advantage that is granted to a beneficiary established in a country where it is not subject to a tax on income or are subject to a significantly more favorable tax regime than that to which the enterprise established in Belgium is subject[107]. This situation applies to the so-called tax havens. With the words '*a significantly more favorable tax regime*' article 26 ITC references to article 203, § 1, al. 2 ITC. Regarding this article, non-exhaustive lists of countries that are considered to have significantly more favorable tax regime were drafted that can serve as a useful reference [108].

The third situation applies to taxpayers who have shared interests with the taxpayer or establishment listed in the first two situations. This exception was added by the Law of the 28 of July 1992[109]. According to the preparatory works, the legislator wanted to prevent the enterprise granting the abnormal and benevolent benefits from resorting the advantage to a foreign natural or legal person, preferably one that is at loss when this natural or legal person is subject to normal tax regime and with whom there is a not directly demonstrable link of

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[104] Article 26, section 2, 1° ITC.

[105] *Com.IB* 1992, nr. 26/37.

[106] *Com.IB* 1992, nr. 26/37.

[107] Article 26, section 2, 2° ITC.

[108] J. MALHERBE and P. MALHERBE, "Les prix de transfert. Approche moniste ou dualiste?", *A.D.L.* 2001/2-3, (117) 167.

[109] Law of the 28th of July 1992 houdende fiscale en financiële bepalingen, *BS* 31 of July 1992.

dependence[110]. The administration also wants to prevent that the receiving foreign natural or legal person functions as an intermediary in order to escape the addition to its own profits of the abnormal and gratuitous advantages granted[111].

That the provider of the advantage in those cases cannot invoke the escape clause implies that, even though he can prove that the advantage is taken into account to when determining the taxable income of the beneficiary, it does not prevent the advantage being added to the profits of the provider. The provider can only give proof that the conditions for abnormal or benevolent advantages are not fulfilled or that he is not established in Belgium. The proof that the beneficiary fulfils the conditions of one of the three situations needs to be brought forward by the tax administration[112].

5 APPLICATION

As been established in the previous chapters, the rules concerning abnormal and benevolent advantages can have repercussions in the non-profit sector. This is especially the case when there are actors involved subject to the CIT. In this chapter, articles 26, 79 and 207, section 7 ITC will be applied to the non-profit sector. Distinction will be made between situations where the provider of the abnormal or benevolent advantage is subject to the CIT or to the LEIT. A same division will be made when developing the situation of the receiver of the abnormal or benevolent advantage.

5.1 AN ABNORMAL OR BENEVOLENT ADVANTAGE GRANTED BY A NON-PROFIT ORGANISATION

5.1.1 PROVIDER SUBJECT TO THE CIT

When an entity active in the non-profit sector is subject to the CIT, it implies that the entity is a resident of Belgium and is considered to be an company for the application of the ITC. The fact that the entity is considered to be a company for the application of the ITC, is an important

[110] *Parl.St.* Kamer 1991-92, n° 444 / 1, 5.

[111] *Ibid.*

[112] B. PEETERS and P. CAUWENBERGH, "Indirecte winstverschuivingen binnen multinationale vennootschapsgroepen: ontwikkelingen sinds de Wet van 28 juli 1992", *AFT* 1993, 166.

sidenote because this implies that the rules touching ordinary companies are applicable to the non-profit entity as well.

Article 26 ITC states that if a company based in Belgium grants abnormal or benevolent benefits, these will be added to its own profits. Firstly, this implies that the entity that grants the advantage is an enterprise. An entity that is subject to the CIT will be considered an enterprise and can possibly fall within the scope of article 26 ITC. Secondly, the conditions for the qualification as an abnormal or benevolent advantage, as laid down under *chapter 3, subsection 1*, need to be fulfilled. When it is established that an enterprise grants an abnormal or benevolent advantage, the question concerning the escape clause arises. The clause demands the advantage to be taken into account to calculate the profits of the entity receiving the advantage.

As elaborated under *chapter 4* when the receiver is a company resident of Belgium, the advantage shall in general be taken into account to calculate the profits of the receiving entity. Since the word 'company' needs to be interpreted in the light of the ITC, this implies that an entity active in the non-profit sector can be considered to be a company and consequently, an advantage granted to this entity shall in general be taken into account to calculate its profits. To summarize, if an entity active in the non-profit sector subject to the CIT grants an abnormal or benevolent advantage to another actor (active in the non-profit sector) which is as well subject to the CIT, article 26, section 1 *in fine* ITC will apply.

Nevertheless, if an entity active in the non-profit sector subject to the CIT grants an abnormal and benevolent advantage to an actor (active in the non-profit sector) subject to the LEIT, the consequences are different. Whereas in the CIT everything received by the company is considered to be profit and is being taxed as such, the LEIT is constructed differently (as is explained under *chapter 2, division 2*). This means that an abnormal or benevolent advantage that is granted to an entity active in the non-profit sector subject to the LEIT will not be taken into account to determine the profits of the entity[113]. Therefore the advantage will be added to the profits of the provider of the advantage.

[113] GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 388.

An example of such a situation is the case of collaboration between municipalities. Municipalities can decide that it is in their advantage to collaborate in certain areas to lower the costs of certain tasks by performing those tasks on a larger scale. Usually, this takes the form of intercommunals, cooperatives, project associations or autonomous municipal companies. The price demanded by the intermunicipal partnership for a service will often be the direct cost of that service[114]. The administration mentioned in its commentary that goods charged at cost, will in general be considered as an abnormal or benevolent advantage and a normal profit margin will be added to the profits of the provider of the goods[115]. Nevertheless, the factual situation of every specific case needs to be considered[116]. As mentioned above one of the main reasons to put in place an intermunicipal partnership is to lower the costs. The Ruling commission already decided in a commercial *joint venture* case that between the members of the joint venture an invoice at cost price for services provided by the members to the joint venture, would not be considered an abnormal or benevolent advantage[117]. This joint venture was a cross-border one and did not take place in the non-profit sector but the conclusion could be useful in for example intermunicipal partnerships.

A second difficulty concerning the non-profit sector arises when elaborating the fusion of an association or foundation with another similar entity using a free (*om niet/à titre gratuit*) contribution[118]. Following the limits imposed by the CSA, the entities involved are obliged to allocate their patrimony for a disinterested purpose[119]. Considering that the contribution is an

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[114] W. PANIS and J.A. JOST, "Intergemeentelijke samenwerkingsverbanden in de inkomstenbelastingen anno 2016", *TVGEM* 2016, afl. 2, 121.

[115] *Com.IB* 26/43.

[116] W. PANIS en J.A. JOST, "Intergemeentelijke samenwerkingsverbanden in de inkomstenbelastingen anno 2016", *TVGEM* 2016, afl. 2, 121.

[117] Advanced Ruling n° 2011.232 dd. 28.06.2011.

[118] GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 383.

[119] Article 1 :2 CSA.

abnormal or benevolent advantage, it will not be added to the profits of the transferring entity if the escape clause enters into force[120].

5.1.2 PROVIDER IS SUBJECT TO THE LEIT

Under this title, the entity active to the non-profit sector is subject to the LEIT and grants an abnormal or benevolent advantage. As mentioned before, contrary to the CIT, only the income specifically mentioned in articles 221-224 ITC is taxable. Which is more, those articles do not reference to articles 26, 79 or 207, section 7 ITC. This means that is not possible to apply article 26 ITC in the situation where an entity active in the non-profit sector subject to the LEIT grants an abnormal or benevolent advantage.

5.2 AN ABNORMAL OR BENEVOLENT ADVANTAGE IS RECEIVED BY A NON-PROFIT ORGANISATION

Whereas *chapter 5, division 1* focused on the rules that strike the provider of an abnormal or benevolent advantage, the rules that concern the receiver of the abnormal or benevolent advantage are articles 79 and article 207, section 7 ITC. In this section, those articles will be elaborated regarding whether the entity active in the non-profit sector, granter of the advantage, is subject to the CIT or to the LEIT.

5.2.1 RECEIVER SUBJECT TO THE CIT

As mentioned several times, the entity active in the non-profit sector that is subject to the CIT will follow the rules applicable to all entities that are considered companies according to the ITC. This also applies to articles 79 and article 207, section 7 ITC. Besides the possible application of those rules, whether the receiver is subject to the CIT is important for article 26 *in fine* ITC. In principle, the taxable income from the entity receiving the advantage will be higher than it would be when the price for the good of service was 'at arm's length'[121]. The advantage causes a diminution of the profits of the granter (subject to the CIT) but will increase

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[120] GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 383.

[121] W. PANIS and J.A. JOST, "Intergemeentelijke samenwerkingsverbanden in de inkomstenbelastingen anno 2016", *TVGEM* 2016, n° 2, 122.

the income of the receiver. Therefor the escape clause was inserted in article 26 ITC because in that case there is no need for a correction of the income of the granter.

The importance of a distinction between a provider of the advantage subject to the CIT and a provider subject to the LEIT arises as to the application of the articles 79 and article 207, section 7 ITC. Article 79 ITC states that *Occupational losses shall not be deducted from that part of the profits or gains which arises from abnormal or benevolent advantages obtained by the taxpayer, in any form or by any means, directly or indirectly, from an enterprise with respect to which he is, directly or indirectly, in any relationship of mutual dependence.* As can be deducted from this article (and article 207, section 7 ITC) the provider of the advantage needs to be an enterprise.

When the provider of the advantage is subject to the LEIT, this implies that the entity does not operate a business, engages in transactions of a profitable nature or is explicitly excluded from the CIT. Without having full disclosure as to the extent of the definition of an enterprise for the application the articles 79 and article 207, section 7 ITC, one can presume that an entity subject to the LEIT, can in most cases not be considered an enterprise as necessary for the application of in those articles[122]. This reasoning has been implicitly confirmed by the ruling commission in an advanced ruling of the 8th of December 2020. The ruling commission needed to decide if the non-accounting of certain difficult to allocate costs by the city, costs that should be borne by an autonomous municipal company (AMC), can invoke the application of the abnormal or benevolent advantages rules (in this case article 79 ITC and article 207, section 7 ITC)[123]. The AMC is subject to the CIT and is not active in the non-profit sector because of its aim to obtain profit and distribute those profits to shareholders. The ruling commission ruled that a municipality or city cannot be regarded as an enterprise[124]. As such, a municipality or city is an entity under the legal entities tax and not taxable on net profits. That the municipality cannot be considered as an enterprise prevents the application of articles article 79 ITC and article 207, section 7 ITC.

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[122] W. PANIS and J.A. JOST, "Intergemeentelijke samenwerkingsverbanden in de inkomstenbelastingen anno 2016", *TVGEM* 2016, n° 2, 122.

[123] Advanced Ruling n° 2020.1957 d.d. 08.12.2020.

[124] *Com.IB* 23/26.

A similar reasoning can be found in the advanced ruling of the 30th of Mars 2010. In this ruling the ruling commission had to decide about the applicability of articles 79 and article 207, section 7 ITC to an interest-free loan provided for by a municipality to an autonomous municipal company (AMC).[125] The applicant notes that the purpose of articles 79 and article 207, section 7 ITC is to prevent profit shifting between entities with profits and beneficiaries with losses. In the case of the municipality, who is subject to the LEIT, those profits are not being taxed, so the municipality has no interest in shifting its profits by using abnormal or benevolent advantages. The ruling commission ruled that the articles are not applicable because the municipality cannot be considered as an enterprise.

When the provider is subject to the CIT as well, the entity will be considered to be an enterprise for the application of the articles 79 and article 207, section 7 ITC. Consequently, it is be possible that certain deductions will be denied to the entity active in the non-profit sector that is subject to the CIT. In this case an analysis of the relationship between the two entities needs to be made. As a matter of fact, the deduction will only be denied when the receiving entity is directly or indirectly in any relationship of mutual dependence with the provider of the advantage. The demonstration of these links of interdependence is a question of fact which seems less obvious in the non-market sector[126].

5.2.2 RECEIVER SUBJECT TO THE LEIT

When an entity active in the non-profit sector subject to the LEIT receives an abnormal or benevolent advantage, as elaborated under *chapter 4* article 26 section 1 *in fine* ITC is not applicable[127]. This is an important consideration when the provider of the abnormal or benevolent advantage is subject to the CIT. Concerning the application of articles 79 and article 207, section 7 ITC when the receiver of the advantage is subject to the LEIT, those articles are not applicable in the LEIT.

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[125] Voorafgaande beslissing nr. 2010.047 d.d. 30.03.2010.

[126] GARROY, X. GÉRARD, A. SOLDAI, C. DE NEYER and A. VANDENDRIES, La fiscalité des ASBL et du secteur non marchand., Wavre, Limal: Anthemis, 2020, 390.

[127] *Ibid.*, 388.

CONCLUSION

The Belgian nonprofit sector is very heterogeneous. All entities active in this sector have an specific purpose which is not related to making profits for its shareholders. It is difficult to arrive at an tax regime that can combine the heterogeneousness of the sector with the nonprofit-purpose. In Belgian tax law, the tax regimes applicable to the nonprofit sector are the LEIT and the CIT. When subject to the CIT, the entity is considered to be a company for tax purposes. Contrary, entities subject to the LEIT will be taxable on specific elements of their income and which is more, income arising from a business activity will not be taxed. It is often said that the LEIT regime is beneficial for entities. In the nonprofit sector with regard to abnormal or benevolent advantages, it is without doubt the case.

The provisions concerning abnormal or benevolent advantages are constructed to counter the effects of transfer pricing. Transfer pricing is an issue that concerns especially for-profit enterprises. Nevertheless, because nonprofit entities are possibly subject to the CIT, they can be treated as companies. This implies that they can be touched by the provisions concerning abnormal or benevolent advantages. Article 26 ITC is applicable to the provider of an abnormal or benevolent advantage. When the entity active in the nonprofit sector is subject to the CIT and the conditions of article 26 ITC are fulfilled, the advantage can be added to the profits of the entity. If this advantage is granted to another entity active in the nonprofit sector subject to the LEIT, the escape clause of article 26 section 1 *in fine* ITC will not be applicable and the provider of the advantage will be taxable on the advantage. Contrary, if the receiver is subject to the CIT, the escape clause will prevent the advantage from being added to the profits of the provider. With regard to articles 79 and 207 section 7 ITC, an entity subject to the CIT can be prevented from deducting losses from the profits arising from an abnormal and benevolent advantage. When the advantage is provided for by an entity subject to the CIT and the conditions concerning mutual dependency are fulfilled, the advantage will be taxable. In case the provider is subject to the LEIT, the entity will normally not be considered as to be an enterprise which prevents the application of articles 79 and 207 section 7 ITC.

This way, the provisions concerning abnormal and benevolent advantages touch the nonprofit sector. Those provisions, that were originally drafted to prevent profit shifting, can for example have implications when an nonprofit organization mergers with another entity by way of an free contribution. This cannot be what the Belgian legislator had in mind.

In the future, the nonprofit sector will continue to play an important role in the Belgian economic landscape. Which is more, the European Union is trying to provide an framework which would simplify circulation of the entities between the different member states. As a consequence, more and more unintended effects from the provisions of abnormal or benevolent advantages can be expected. This eagers towards adjustments to take into account the specificity of the nonprofit sector.

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