

NEW TAX REGIME FOR EXPATRIATES IN BELGIUM

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Título

Nuevo régimen fiscal aplicable a los expatriados en Bélgica.

Resumen

Se analiza la evolución del régimen fiscal aplicable a expatriados en Bélgica, analizando el régimen aplicable anterior, el de 1983, con los problemas que conllevaba y las novedades del nuevo régimen aplicable a partir del 1 de enero de 2022 junto con las particularidades del mismo.

Palabras clave

Régimen fiscal, expatriados, impuesto sobre la renta, empleados extranjeros, Fiscalidad favorable.

Abstract

The evolution of the tax regime applicable to expatriates in Belgium is analyzed, seeing the previous applicable regime, that of 1983, with the problems it entailed and the novelties of the new regime applicable as of January 1, 2022, together with its particularities.

Keywords

Tax regime, Expatriates, income tax, foreign employees, favorable tax.

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SUMARIO

1. Introduction
2. The 1983 regime
 - 2.1. Eligible persons
 - 2.2. Tax regime
 - 2.3. Deductions
 - 2.4. Procedure
3. Problems raised by the regime
4. The 2022 regime
5. Abbreviations

«Welcome foreigners because you too will be a foreigner»

Greek epigraph to the novel of Roger Ikor «Les eaux mêlées»

1. Introduction

The reform of the tax regime applicable to expatriates working in Belgium is an opportunity to reconsider the solutions which may be given to a lasting problem of international tax law. In Belgium as in many European countries, the burden of taxes on income and especially on professional income became after World War II extremely high due to the expanding role of the State. It was also characterized by a steep progressivity. The income tax was transformed in 1962 from a schedule-based system, applying different taxes to income from real property, from capital and from professional activity into a global system, resulting in a further increase of the tax bill of the taxpayer. In a parallel way, tax evasion in respect of dividends and interest became widespread, due to the proximity of countries like Luxembourg or Switzerland, where it was possible to open accounts and perceive income from capital without reporting it bearing only the –lower– withholding at source. This situation led the Belgian government in 1984 to «deglobalize» such income, submitting it only to a tax equal to the withholding at source, ranging between 15 % and, ultimately, 30 %. Exchange of information put an end to this situation following the G20-OECD and EU inspired regulations.

However, as soon as Belgium in 1960 realized the need and potential of foreign investment, especially American, it was faced with the lack of appetite of employees recruited abroad by multinational companies to submit themselves to taxation higher than the one existing in their country of origin and the reluctance of employers to assume the corresponding salary raises, not to mention high social security contributions.

As it was difficult to present to Parliament a law giving to foreign employees a more favorable tax *status* than to Belgian employees, the tool of an administrative circular was used, granting first to American employees recruited abroad, then to all foreign employees so recruited various tax advantages which *de facto* alleviated the salary expenses of their employer and were geared at attracting foreign investment¹.

The Supreme Court (Cour de cassation) of Belgium held that the additional lump sum expense deduction provided by the circular was devoid of a legal basis². The administrative regime was withdrawn and replaced by a new one intended to withstand the text of legality, in conformity with the Belgian Cons-

1 Circular Ci.R.9.USA/202.118 of 29 September 1960 and Circular Ci.R.9.USA/217.882 of 23 February 1963. Cfr. C.A. Dilley and E.J. Herpin, *The Circular: an in-depth analysis of Belgium's special tax regime for foreign executives*, Brussels, Bruylant, 1979; J. Malherbe, *La légalité du régime administratif des cadres étrangers*, JDF, 1982, p. 66.

2 Cass., 21 May 1982, Pas., 1982, I, 1107, FJF, nr. 82/159; Cass., 19 November 1981, FJF, nr. 82/12.

titution providing that taxes and tax exemptions must find their source only in a law³.

The rules applying to qualified expatriates, which subsist for a transitional period for previous beneficiaries after the adoption of the new regime, are summarized hereunder⁴ to allow an understanding of the legal problems raised and their growing inadequacy to the new European and international legal order.

2. The 1983 regime

2.1. Eligible persons

The special tax regime may be applied upon request to certain foreign company directors and officers and to foreign employees who :

- (a) are posted from abroad to Belgium to work temporarily in one or several branches of a foreign enterprise or in a company controlled by such foreign enterprise;
- (b) are posted from abroad to Belgium by a foreign company, member of an international group, to work temporarily in one or several Belgian companies which are members of the group or in the group's control or coordination office, i.e., in headquarters;
- (c) have been hired directly abroad by a Belgian company which is a subsidiary of a foreign company or a member of an international group to work temporarily in the Belgian company or in the group's control or coordination office;
- (d) are researchers hired directly abroad by Belgian or foreign research centres or laboratories to work temporarily in Belgium.

The regime does not apply to employees of non-profit making associations, e.g., professional organizations, or to partners of partnerships without legal personality.

Taxpayers must take up the qualifying position as their first assignment in Belgium; they may not move from a local job to an assignment covered by the Circular and thereby claim the favorable regime. Relocations within a group will not preclude the continued application of the provisions of the Circular.

The special tax regime is normally granted only to :

- executive staff members, i.e., persons who exercise functions requiring special knowledge and responsibilities or which are predominantly managerial in nature;

3 Circular Ci.RH.624/325.294 of 8 August 1983.

4 See a.o. L. Vanheeswijck and L. Vanaverbeke, *De belasting van buitenlandse kaderleden in België*, Mechlin, Kluwer, 2007; J.L. Davain, *Le régime spécial d'imposition des cadres et dirigeants étrangers*, Brussels, Kluwer, 2003; A. De Reymaecker, *Buitenlandse kaderleden en fiscus*, Diegem, Ced.Samsom, 2002.

- researchers in scientific research centres and laboratories, i.e., centres devoted exclusively to the development of new processes or data and not to the mere collection of information or documentation;
- lower level employees, but only if suitable employees are not available for recruitment in Belgium or if recruitment would be particularly difficult.

2.2. Tax regime

Although these foreign persons are residents, they may be considered as non-residents if they have maintained their family, a house, or the centre of their economic interests abroad, because of close ties with a foreign enterprise that may require their transfer elsewhere at any time. The taxpayer must prove the temporary nature of his assignment. Purchasing a house in Belgium or signing a contract subject to no time limit is not *per se* an indication that the employment becomes permanent and that the taxpayer should lose his privileged tax *status*. Additional factors showing that the centre of economic interests is located abroad include ownership of foreign real or personal property (such as bank accounts), coverage by foreign insurance or social security, etc.

2.3. Deductions

These foreign directors and employees are therefore taxed as nonresidents on the total earned income collected in Belgium and income from real property located in Belgium.

Qualifying foreigners may exclude from taxable income certain payments made by the employer which are considered as expenses incurred on behalf of the employer, including :

- *once-off* expenses: relocation expenses relating to the move to or from Belgium or to the establishment of a home in Belgium.
- recurring expenses including the following :
 - differences in cost of housing or cost of living between Belgium and the country of origin;
 - schooling for children in international or private schools during elementary or high school;
 - one trip per year to the country of origin for the director or employee and family;
 - loss suffered when the home in the country of origin can be rented only below normal value;
 - trips due to special circumstances (death or illness in the family);
 - exchange rate differences;
 - tax equalization; and
 - two annual trips for children studying abroad to visit their parents.

Except for schooling expenses and *once-off* expenses, the allowances must be duly documented and may not exceed € 11,250 for expatriates in general and

€ 30,000 for staff members of control or coordination centres or scientific research centres or laboratories.

In addition, remuneration allocable, after the above-mentioned deductions, to work performed abroad is not included in taxable income. The excluded income is, as a rule, computed as follows :

Total remuneration x working days spent in Belgium

Total number of working days for the year

Back pay and indemnities in lieu of notice, which are taxed separately from other income, are entirely taxable in Belgium.

2.4. Procedure

All employers who wish to apply this special tax regime to their foreign executives must file a request with the Assistant Director of the Authorities» foreign service. Such request must be submitted before June 30 of the year in which the assignment in Belgium starts or, at the latest, two months from the start of the assignment in Belgium, if the assignment starts after June 30⁵.

3. Problems raised by the regime⁶

Similar regimes were introduced in neighboring countries, such as France and the Netherlands.

The first problem to arise was again the legality of the introduction of such a regime by an administrative circular. The Court of Audit (Cour des comptes), a body scrutinizing the State budget, issued two critical reports⁷.

However, several court decisions applied the circular to specific litigations raised e.g. by taxpayers to which the application of the regime had been denied by the administration⁸, what implied an admission of legality as tax law is an element of public policy (ordre public) and illegality must be raised *ex officio* by a Court.

A second problem was the restricted availability of the regime, open only to foreigners, not e.g. to a Belgian citizen living abroad and recruited there. Such

5 Com. CIT, 235/17.

6 H. Niesten, Het bijzonder statuut van buitenlands kaderlid na 35 jaar circulaire fiscaal doorgelicht, TFR, 2019, p. 1046.

7 Cour des Comptes. Le régime spécial de taxation des cadres étrangers. Rapport de la Cour des Comptes transmis à la Chambre des représentants, Brussels, February 2003; Impôt des non-résidents personnes physiques. Pistes de réflexion pour une imposition plus efficace. Rapport de la Cour des Comptes transmis à la Chambre des représentants, Brussels, November 2014, p. 19, 26 and 61.

8 H. Serruys, Het bijzonder belastingstelsel voor buitenlandse kaderleden – Overzicht van rechtspraak na 30 jaar circulaire, AFT, 2013, nr. 11, p. 4; L. Hinnekens, Hoe wettelijk en essentieel is de hoedanigheid van niet-verblijfhouder in de Circulaire voor buitenlandse kaderleden?, in Liber Amicorum Albert Tiberghien, Brussels, Kluwer-Ced.Samsom, 1984, p. 217.

a discrimination could be considered as contrary to the free movement of workers within the European Union (art. 45 TFUE).

A third problem was related to the relationship of the expatriate with his country of origin. For Belgian purposes, he was considered a non-resident. His income from capital was tax exempt, as the professional income related to his time spent abroad. In his country of origin, he had generally deregistered as a resident. His income exempt in Belgium had therefore a good chance of being taxed nowhere.

However, after the entry into force of the exchange of information requirements of the Common Reporting Standard and of the European Directive on the topic, information started to be supplied by Belgium to the countries of origin, resulting in new obligations for the taxpayers concerned.

Besides, the circular excluded the expatriates covered from the application of tax treaties, this implying in some way that they were residents of Belgium although formally treated as non-residents subject to the non-resident income tax and not to the general income tax on individuals resident in Belgium.

Finally, the sixth reform of the Belgian State transferred to the regions (Flanders, Wallonia, Brussels-Capital) the application of the rule introduced in the non-resident income tax pursuant to the Schumacker judgment of the ECJ granting personal deductions to EEA non-residents provided that they derive 75 % of their professional income from Belgium. This raised detailed distinctions which lose any interest under the new regime and shall not be mentioned here.

The qualification of the regime as State aid prohibited by article 107 TFUE could also be raised, although the Code of Conduct activity of the European Commission generally did not encompass incentives granted to individuals, even if they benefit their employers.

In his 1974 IFA general report on tax aspects of temporary activity exercised abroad, Mr. Pierre Kerlan concluded that «The development of international trade is tending to make the search for an acceptable solution even more urgent»⁹ and the Belgian reporter, Professor Paul Sibille, wrote that exemptions must be narrowly defined and that any policy should address problems of an economic nature¹⁰ only. Some forty years after the 1983 circular, the Belgian legislator has answered this call.

4. The 2022 regime

As from 1 January 2022, the old expat regime has been replaced with a new regime. While the new regime should provide more legal certainty and

9 XXVIVth Congress of the International Fiscal Association, Mexico 1974, Cah. Dr. fisc. Intern., vol. LIXb, Tax problems resulting from the temporary activity abroad of employees of enterprises with international operation, P. Kerlan, General Report, I/66.

10 Id., P. Sibille, Belgian Report II/80.

accommodate certain flaws, it also brings a number of fundamental changes¹¹.

Under the old expat regime, expats were fictitiously considered as «non-residents» for income tax purposes. One of the disadvantages of the old system was therefore the fact that expatriates could not benefit from the protection of the tax treaties concluded between Belgium and their country of origin. The current regime also caused problems in the exchange of information between Belgium and the countries of origin of the expatriates.

Under the new regime, a distinction is made between «incoming taxpayers» and a special category, «incoming researchers». Incoming taxpayers and incoming researchers will have the same tax advantages. Both categories will in principle be considered as residents of Belgium for income tax purposes, with the following differences in terms of personal scope and conditions:

- For «incoming taxpayers», a salary of more than €75,000 will be required to qualify for the new scheme (excluding the employer's own expenses). No specific degree or professional experience is required. The remuneration will be calculated on a *pro rata* basis during the year of arrival and departure or, for example, in the event of a change of employer. The remuneration corresponds to the work of the beneficiary in Belgium. If he is e.g; on a *split* salary, the remuneration from foreign sources does not enter into the computation. Executives and/or directors can only benefit of the expat regime to the extent that (1) they are involved in the day-to-day management of the company (2) they are not (co-)founders of the company and (3) they own less than 30% of the shares in the company.
- For «incoming researchers», no minimum salary is required but they must have a qualifying Master's degree or the equivalent of 10 years» professional experience. Moreover, the regime for incoming researchers will only apply to employees (and not to company directors).

The new regime will apply to incoming taxpayers and researchers of Belgian or foreign nationality, whereas until now it was only foreseen for the latter. The beneficiary must be (i) directly recruited abroad, or (ii) assigned in Belgium within a multinational group. Non-profit associations are now also included in the scope of the regime.

It is immaterial whether the relationship has been established via a third party, such as an executive search firm.

During the 60 months prior to the start of his employment in Belgium, the beneficiary may not (1) have been a resident of Belgium (2) have resided within a zone of 150 km of the Belgian borders or (3) have been subject to non-resident taxation in Belgium.

¹¹ Program-law of 27 December 2021, art. 13, introducing new articles 32/1 and 32/12 of the Income Tax Code (Moniteur belge, 31 December 2021); Circular 2022/C/47 of May 6, 2022; «Contribuables impatriés: attention au passage à un temps partiel», Fiscologue, 2022, n° 1747, p. 1; A. De Reymaeker, La réforme du régime des cadres étrangers, Actualités fiscales, 2021, nr. 38, p. 1.

A fixed percentage of 30% of the remuneration can be considered as «own costs of the employer», exempt from any tax for the expat. That means that the payment by the employer of the recurring costs resulting from the employment in Belgium, on top of the salary, can be considered as a repayment of the employer's own costs, as long as these costs do not exceed 30 pct. of the remuneration. This tax-free amount is capped at €90,000 per year (calculated pro rata during the year of arrival and the year of departure), which means that the tax-free amount can be applied to the amount of the salary up to €300,000 annually. The new regime will be more transparent and easier to manage for international companies, in contrast to the old regime (which provided for a specific calculation of the days spent abroad and the non-taxable remuneration).

The amount exempt for tax purposes is also exempt for social security purposes¹².

In addition to the fixed percentage, costs related to (1) moving to Belgium, including 3 months of hotel costs (2) furnishing of the house in the first 6 months after arrival in Belgium, limited to EUR 1,500, and (3) school expenses for the children for private or international schools in Belgium, are also considered as own costs of the employer. Since the new regime provides no fixed rate for these specific costs, the employee or manager must always provide sufficient evidence in this respect.

Each employer must submit the application for the new regime electronically with proof of the employee's consent and the employer's own costs must always be specified. The tax administration must in principle decide on the application within three months after receipt of the request. A new application must be submitted in case of a change of employer and the condition of a minimum remuneration of EUR 75,000 for incoming taxpayers (not researchers) must be permanently fulfilled in this context. The employer must annually provide the tax administration with a list of the beneficiaries of the expat regime.

The new regime will be applicable for a maximum of five years, which can be extended for three years, up to a total of eight years (while the old regime had an unlimited duration). The new regime is in principle applicable to expatriates starting their employment in Belgium as from 1 January 2022, but foreign executives benefiting from the old regime can also opt for the new scheme before 30 september 2022.¹³

Expats that benefit from the old regime can indeed rely on transitional measures. In this case, the time spent by the expat under the old regime is taken into account for the initial maximum period of 5 years. Expats can only opt for the new regime if they have qualified as an incoming researcher or tax payer for no longer than 5 years on 1 January 2022 and in case the three conditions mentioned above have been complied with during the 60 months prior to the start of their employment in Belgium. The extension of the initial 5-year period - in case it expires after 1 January 2022 - is however still possible until 30 September

12 Royal Decree of 28 November 1969, art. 19, § 2, 4°, modified by Royal Decree of 17 March 2022, *Moniteur belge*, 30 March 2022.

13 *Projet de loi du 22 juin 2022, Doc. 55 Chambre 2722/004; «Contribuables impatriés et chercheurs impatriés : délai au moins jusqu'au 30/9», Fiscologue, 2022, no 1751, p. 12*

2022¹⁴. Not all expats benefiting from the old regime will therefore be eligible under the new regime, also due to the different and generally more stringent conditions. In this case, the old regime can still be applicable until 31 December 2023.

Expats can, for instance, only opt for the new regime if they have qualified as an incoming researcher or tax payer for no longer than 5 years and in case the three conditions mentioned above have been complied with during the 60 months prior to the start of their employment in Belgium.

There will of course be «winners» and «losers» compared to the previous regime, with the winners being mainly the expats with Belgian nationality and the losers being the expats for whom the initial 5-year term has already expired on 1 January 2022.

The future will tell whether problems arising under the old regime are solved by the new one.

The following conclusions were already drawn by the Government when presenting the statute to Parliament¹⁵.

The new regime applies as well under the income tax of residents as under the income tax of non-residents; it is no longer necessary to consider fictitiously that a beneficiary is considered as a non-resident. He may be if he keeps his residence abroad, but this will be rather exceptional. In this case, he will have to submit a certificate of his State of residence stating that he is subject to income tax in that State. An end is put to the existence of tax statelessness of beneficiaries who were residents nowhere.

The benefits of the new system are granted to the expat (now labeled an «impatriated») and not to his employer.

The new regime is not dependent on the temporary nature of the activity as it is granted only for five years, eventually eight years.

It is applied to foreigners and Belgian nationals alike and is fully compliant with the free movement of workers under the TFEU.

The requirement of non-residency during 60 months prior to employment does not infringe such freedom but is meant to avoid abuses and demonstrate that the employee has indeed been recruited abroad.

No condition relates to the possession of a degree. It is indeed difficult for a tax administration to deal with the problem of equivalence of foreign and Belgian degrees.

The government considers that the amount of the expense considered as expenses of the employer with a ceiling of 30 % does not lead to an excessive allocation of extraterritorial outlays¹⁶.

14 Exposé des motifs du 2 juin 2022, Doc. 55 Chambre 2722/001; «Projet de loi sur des dispositions fiscales diverses et sur les tax shelters», *Fiscologue*, 2022, no 1750, p. 4.

15 Exposé des motifs, Doc. 55 Chambre 2349/001.

16 Comp. ECJ, 24 February 2015, C-512/13, *Sopora v. Staatssecretaris van Financiën*, ECLI:EU:C:2015:108.

5. Abbreviations

Cah. Dr. fisc. Intern.	Cahiers de droit fiscal international
FJF	Fiscale jurisprudentie-Jurisprudence fiscale
JDF	Journal de droit fiscal
TFR	Tijdschrift voor fiscaal recht