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In This Issue

[Attaching Bank Accounts of Embassies: Belgian Supreme Court Gives Judgment](#)

[À propos de l'exemption de TVA applicable aux ambassades](#)



Attaching Bank Accounts of Embassies: Belgian Supreme Court Gives Judgment

On November 22, 2012, the Belgian Supreme Court handed down a noteworthy judgment in a case concerning the attachment of bank accounts of diplomatic missions accredited in Belgium. Whilst lower courts had already touched upon this issue in the past, it is the first time in Belgium that the Supreme Court was called upon to rule on the question of the immunity enjoyed by embassy bank accounts.

Facts

With a view to enforcing a judgment of a U.S. court, a foreign company seized the bank accounts of the diplomatic mission of a foreign State in Belgium. The Brussels Court of Appeals accepted the company's contention that this State waived its immunity from jurisdiction and execution in the contract concluded with the company, and that such waiver extended to embassy bank accounts. Hence the validity of the seizure was upheld by the Court of Appeals.

Held

The Supreme Court set aside the Court of Appeals decision, based on the following rules of international law:

- Article 22.3 of the Vienna Convention on diplomatic relations:

The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

- Article 25 of the Vienna Convention on diplomatic relations:

The receiving State shall accord full facilities for the performance of the functions of the mission.

- The rule of customary international law "ne impediatur legatio".

According to the Supreme Court, the "ne impediatur legatio" principle entails that all assets assigned to the functioning of the diplomatic mission enjoy an autonomous immunity from execution, distinct from that of the sending State. As a result, no seizure or enforcement measure can be taken on these assets unless the sending State explicitly agrees on the

adoption of such measures in respect of this category of assets or part of this category.

Therefore, the Court of Appeals – which did not determine that the attached amounts were assigned to purposes other than the functioning of the embassy – erred in law when holding that the general waiver provided for in the contract extends to the assets of the embassy (including its bank accounts), without requiring an explicit and special waiver in respect of these assets.

Remarks

- Unlike the French Supreme Court, which delivered a similar judgment in 2011 between the same parties, the Belgian Supreme Court does not go as far as making clear that the embassy bank accounts are presumed to be assigned to the fulfilment of the functions of the mission, and that it is accordingly up to the creditor to demonstrate that they are used for a private or commercial activity.
 - Whilst clarifying the legal status of embassy bank accounts, the decision of the Belgian Supreme Court does not explicitly address the scope of the broader, general immunity from execution of foreign States. In this respect, Belgian lower courts tend to consider that such immunity only covers assets assigned to sovereign activities. A clear confirmation by the Supreme Court is still expected on this point.
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À propos de l'exemption de TVA applicable aux ambassades

La Cour d'appel de Bruxelles a rendu un arrêt, le 12 décembre 2012, dans lequel elle pose une question préjudicielle à la Cour constitutionnelle concernant l'article 42, § 3, alinéa 2, du Code belge de la TVA.

Cette disposition légale prévoit que le ministre belge des Finances, ou son délégué (c'est-à-dire l'administration fiscale fédérale), sont autorisés à fixer les « limites » et « conditions d'application » des exemptions de TVA prévues à l'article 42, § 3, alinéa 1er du Code. Parmi ces exemptions figure celle accordée aux missions diplomatiques et consulaires pour les acquisitions de biens et de services effectuées dans le cadre de leur usage officiel (article 42, § 3, alinéa 1er, 1^o). Le litige porté devant la Cour d'appel de Bruxelles concernait d'ailleurs la portée de cette dernière exemption, puisqu'il s'agissait notamment de la livraison de repas à des ambassades : l'exemption avait été refusée au fournisseur lors d'un contrôle fiscal, sur la base uniquement de circulaires adoptées par l'administration fiscale, et sans référence à une base légale dans le Code de la TVA.

La Cour d'appel demande à la Cour constitutionnelle de se prononcer sur la compatibilité de la délégation de pouvoir octroyée au ministre des Finances (et de la sous-délégation de pouvoir octroyée à l'administration fiscale) avec le principe constitutionnel de la légalité de l'impôt (articles 170, § 1er, et 172, alinéa 2, de la Constitution).

La réponse de la Cour constitutionnelle sera sans doute connue d'ici un an environ. De cette réponse dépend le pouvoir du ministre des Finances (et, ce qui en pratique est

plus important encore, de l'administration fiscale agissant par voie de circulaires) de déterminer, en lieu et place du législateur, les limites et conditions d'application de l'exemption de TVA accordée aux missions diplomatiques et consulaires.

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Lorenz | International Lawyers
Boulevard du Régent 37-40 Regentlaan
1000 Brussels

Phone +32 (0)2 239 2000 | Fax +32 (0)2 239 2002 | E-mail info@lorenz-law.com |

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