Tax controversy series

Administrative tribunal judgment on the minimum net wealth tax

On 26 March 2024, the Luxembourg administrative *Tribunal issued a judgement (Tribunal administratif, 26 mars 2024, n°45910a)* concerning a SOPARFI[1] taxpayer that had challenged the amount of minimum net wealth tax (NWT) it was liable for, sustaining that its legal basis was unconstitutional. This judgement results from the case that gave rise to the recent landmark decision rendered by the Constitutional Court on 10 November 2023 *(Cour constitutionnelle, 10 novembre 2023, n° 185/23)*[2][3].

Summary of the case

In the case under review, the taxpayer challenged the tax assessment issued, according to which it was liable for the minimum NWT amounting to EUR 4,815 for the fiscal year 2019. Although the company did not contest the elements assessed and taken into consideration for computation purposes, it contested the legal basis on which said computation had been carried out. The litigious provision was paragraph 8, sub. 2, point a) of the *Vermögensteuergesetz* (**VStG**) according to which the minimum NWT should amount to EUR 4,815 for companies holding predominantly financial assets (i.e., more than 90%) and having a total balance sheet amounting to more than EUR 350,000.

However, if the balance sheet had been slightly different (i.e., 90% or less of financial assets recorded under accounts 23, 41, 50 and 51 of the standard chart of accounts), the company would have been subject to EUR 1,605 of (progressive) minimum NWT based on paragraph 8, sub. 2, point b) VStG since the total balance sheet was below EUR 2 million in this case.

The claimant therefore argued that the legislation currently in force was not in line with the purpose of the NWT and was contrary to article 15 (1) of the Constitution (*principe d'égalité devant la loi*), which proclaims the equality of all citizens before the law and guarantees a non-arbitrary form of government. An administrative claim to the director of the tax authorities was filed in that sense in October 2020.

As neither the tax office nor its director are competent to take a position on the conformity of a legal provision with the Constitution, the latter simply verified the accuracy of the wealth basis upon which the NWT was calculated and reviewed the correct computation of its amount, in accordance with the Luxembourg law. Observing that the relevant provisions had been correctly applied in the case at hand, the initially determined amount of NWT was confirmed by the director of the tax authorities, and the taxpayer's claim was subsequently rejected in January 2021.

Unsatisfied with the outcome, the taxpayer lodged an appeal with the administrative Tribunal. In this respect, a first decision was issued in April 2023[4] followed by a decision of the Constitutional Court on 10 November 2023. Further to the latter, the administrative Tribunal had to review the case for a second time leading to the decision under consideration issued on 26 March 2024.

Context of the decision

The first decision of the administrative Tribunal is of relevance as it led to the much-discussed judgment of the Constitutional Court on 10 November 2023[5], in which paragraph 8, sub. 2, point a) VStG, was deemed unconstitutional. As outlined by the Constitutional Court, said paragraph effectively established an unjustified discriminatory treatment between:
1. Taxpayers falling within the scope of point a), namely companies holding more than 90% of financial assets (i.e., those recorded under accounts 23, 41, 50 and 51 of the standard chart of accounts) with a total balance sheet of more than EUR 350,000, for which the minimum NWT amount of EUR 4,815 would automatically be charged; and
2. Those with a total balance sheet ranging between EUR 350,000 and EUR 2,000,000 and which would not exceed the above 90% threshold, hence falling under point b) of the same paragraph for which the minimum NWT amounts to EUR 1,605.

The above decision was based on the absence of an acceptable rationale for the EUR 350,000 threshold.

The Court also ruled that, while awaiting legislative reform, the minimum NWT referred to in point b) of paragraph 8, sub. 2 VStG (i.e., EUR 1,605) should be applied to taxpayers which would presumably fall under point a) whenever more favorable.

Decision of the Court

The legal proceedings unfolded in two stages. They began in April 2023 with the administrative Tribunal acknowledging that the director's decision should *prima facie* be upheld as the taxpayer simultaneously met both criteria set forth in paragraph 8, sub. 2 point a) VStG. The judges however quickly delved into the central question of the dispute which was whether the litigious paragraph effectively established a discrimination between the taxpayer in question, and taxpayers with the same total balance sheet but holding 90% or less of financial assets.

The judges confirmed that the issue had merit. However, since the determination of the conformity of a law to the Constitution did not fall within their jurisdiction, they decided to suspend the proceedings and refer the matter to the Constitutional Court to get a preliminary ruling to settle this point. The decision of the Constitutional Court, rendered on 10 November 2023, deemed the disputed provision unconstitutional. The proceedings before the administrative Tribunal consequently resumed on 26 March 2024.

The judge noted that a revised tax assessment with respect to the 2019 NWT had been issued by the tax office to the taxpayer on 31 January 2024. The judge further observed that it was issued in line with the conclusions of the Constitutional Court's decision (and with the company's initial claim), applying this time point b) of paragraph 8, sub. 2 of the VStG, thus setting the claimant's NWT at EUR 1,605. There is therefore no surprise on the facts.

The judgement of 26 March 2024[6] is however particularly interesting from a procedural perspective.

The judgement illustrates that, even when the taxpayer seeks to challenge the constitutionality of a legal provision on which their taxation is based, the procedure to follow should remain the same as usual. Namely, to file a claim with the director of the tax authorities in order to be able, at a later stage, to bring the matter before the administrative Tribunal. Though, as stated previously, neither the tax office nor its director are competent to take a position on the conformity of a legal provision with the Constitution. There is no other way and no other procedure to follow for the taxpayer to get satisfaction in case of alleged incompatibility between the tax law and the Constitution. It also illustrates the possibility for the tax office to spontaneously rectify its mistakes or at least to change its position on a specific tax matter during the legal proceedings. In the case at hand, the tax office availed itself of this option by re-issuing a revised tax assessment on its own initiative in accordance with the decision of the Constitutional Court.

The judgement of 26 March 2024 constitutes one of the quite rare occasions in which this type of situation occurs: First, because the vast majority of tax assessments do not give rise to a conflict. Second, because the tax authorities even more rarely change their approach during the dispute phase. And third, because when they do, the taxpayer is generally satisfied and decides not to go on with the litigation. Therefore, this judgement constituted a unique occasion for the administrative Tribunal to confirm the effect of the issuance of revised tax assessments. In particular, it is clarified that in case the tax office decides to issue new tax assessments during the litigation phase, the decision of the director of the tax authorities being litigated is cancelled with retroactive effect.

Overall, from a more practical standpoint, this judgement is very good news for SOPARFI taxpayers falling until now within the scope of point b) of paragraph 8, sub. 2 VStG, even though some caution should be exercised regarding its interpretation. With respect to past fiscal years for which tax returns have already been filed, many companies impacted by this judgement are inquiring about the course of action. Although tax offices should in principle be bound by the decision of the Constitutional Court, it was not certain until its publication what should be the right approach to take and what were the intentions of the tax authorities.

Following this judgment and what we learn through it about the reaction of the tax authorities in this case, it seems reasonable to expect that discussions with the tax authorities may be envisaged in case the favorable application of the law is not directly applied, when relevant, in the tax assessments issued.

Indeed, in the case at hand, it should be noted that the taxpayer could not be compensated for the proceedings' costs. From a technical point of view, the reasoning of the administrative Tribunal's decision on this point is the following: in a context where the tax authorities had simply applied the relevant legal provision at the time, when refusing to welcome the claim of the taxpayer the latter did not sufficiently demonstrate that it would be unfair to have them bear the costs of proceedings. Though we do not have the detailed arguments put forward by the claimant in this respect, the judgement of 26 March 2024 seems questionable when taking into account:
- The cost of a litigation compared to the taxes to be collected, and
- The disproportion between the power and resources of the State and those of a single taxpayer.

This judgement could have the unintended effect of discouraging future claims against unconstitutional laws when the amounts at stake are small. This does not seem to be in the interest, not only of taxpayers but more broadly, of justice and fairness.

In any event, in the framework of the preparation of their 2023 tax return and the determination of the 2024 NWT liability, we would further advise SOPARFI taxpayers to apply point b) of paragraph 8, sub. 2 VStG when deemed more favorable. Taxpayers should not have to wait for the law to be amended as such approach would be in line with the Constitutional Court's decision. Besides, it should be stressed that the future of the disputed provision is quite uncertain. As emphasized by the Constitutional Court, it must now be reformed by Parliament. It did not however provide any indication regarding the direction this reform should take, hence leaving the legislature free to decide whether to amend the paragraph in question in a favorable or unfavorable manner for taxpayers.

As mentioned above, the case judged by the administrative Tribunal on 26 March 2024 illustrates the fact that the tax authorities are bound by the decision of the Constitutional Court, and thus are seemingly willing to amend tax assessments that applied the unconstitutional provision. However, this decision does not allow us to presuppose the direction that the forthcoming reform may take. We will closely monitor how the situation develops as this may, potentially, have a significant impact on the NWT liabilities of the taxpayers, in particular those which did not initially fall within the scope of paragraph 8, sub. 2, point a) VStG.

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1) SOPARFI stands for «*Société de participations financières*», i.e., a Luxembourg company whose main purpose is the holding of participations in Luxembourg and foreign companies.
2) Arrêt de la Cour constitutionnelle n° 00185 du 10 novembre 2023, Mémorial A – N° 745, 20 novembre 2023.
3) E. LEBAS et B. LEVY, «Trajectoire de l'impôt minimum au Luxembourg», *Revue générale de fiscalité luxembourgeoise*, Larcier, Avril 2024, n° 2024/1, p. 8.
4) *Tribunal Administratif, 18 avril 2023, n°45910.*
5) Luxembourg Tax Alert 2023-17 - KPMG Luxembourg
6) Tribunal administratif, 26 mars 2024, n°45910a