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‘Putting flesh on the bones of my dreams’

General
What lies before you is the result of my research, entitled “Le droit de rêver”. The subject of this research is the concurrence of the imposition of transfer tax and turnover tax or, as is the same in this research, value added tax (VAT), in national transactions concerning immoveable property. The core of the issue is immediately apparent when writing the words “immoveable property” ("onroerende zaken").

The Law on the Taxation of Legal Transactions, the formal legal basis for the imposition of a tax on national legal transactions known as transfer tax, is based on wording from national civil law. Explaining the legislative provisions will, therefore, primarily walk over the beaten paths of national civil law.

In the Netherlands, the imposition of VAT, a European or Community harmonised tax on use, is based on the provisions of the Law on Turnover Tax 1968. As the Law on Turnover Tax 1968 is a result of the implementation of European legislation, it applies Community concepts and interpretation of the provisions therein must be from a European law perspective. In cases of uncertainty when interpreting these provisions there is a possibility, or obligation, for the national courts to refer so-called “preliminary questions” to the Court of Justice in Luxembourg. This process, or right to justice, also applies to the imposition of transfer tax when, in a dispute before a national court, a judge is confronted with unclear Community law or an interpretation issue. The requirement to interpret the concept of VAT in a transfer tax dispute, when dealing with the exemption from transfer tax as set out in the Law on the Taxation of Legal Transactions, is one example. It is in this manner that preliminary questions can be referred to the Court of Justice when dealing with a strictly national tax, such as transfer tax.

The national legislator includes, in Article 15(1)(a) of the Law on the Taxation of Legal Transactions, a provision in the form of an exemption which, under certain circumstances, removes the imposition of transfer tax. The exact reasoning behind the implementation of this provision is hazy. In the explanatory notes to the legislation, the legislator explains that this exemption does not apply in cases concerning used immoveable property where the VAT applicable under Article 15 of the Law on Turnover Taxes 1968 can be recovered by the purchaser. On further examination, I have established from parliamentary history that distortion of competition and the avoidance of double taxation, in cases where the purchaser has no right to recovery of VAT, were also given as reasons. This provision is, nevertheless, cast in the form of an exemption. In order to apply such an exemption, certain conditions, as set out in the provision, must be fulfilled. These conditions refer, in greatest part, to the imposition of VAT. The differing characters of both taxes, the dissimilar approach of the taxes and the consequent divergent definitions used by both taxes leads, in most cases and on strict interpretation of such wording, to a legal impossibility for the taxpayer to take advantage of the exemption from transfer tax.

My research explains, in the first instance, these differences, which result from the forced application of both taxes when transferring immoveable property situated in the Netherlands. It is possible that the “ingrained” differences will be remedied by judicial activism,

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by responses from the legislator on unwelcome litigation or by the conduct of the practitioners of this legislation.

Character of the taxes
In my research on the concurrence of the two taxes, I have also obtained a good perspective on the character of the taxes. The character of a tax determines, or colours, not only the content and meaning but also the application of the essential legal concepts. The four essential features of European VAT are:
1. the tax applies generally to transactions concerning goods and services;
2. the amount of tax is proportional to the price that the taxpayer receives for his goods or services;
3. the imposition of the tax occurs in each and every phase of the production and distribution chain, including the retail stage, regardless of the number of preceding stages; and
4. the taxpayer can reduce, with the tax due in the preceding stages of the process, any tax due by him such that, at a certain point, the tax applies only to the added value and the burden ultimately lies with the consumer.

The character of a national tax such as transfer tax can be described as a one-off objective tax on transactions concerning the acquisition of immoveable property in the Netherlands. The mere carrying out of the transaction is sufficient to bring one within the scope of the tax.

With this view on the characteristics of both taxes, it is apparent that, while Dutch transfer tax is not a European VAT, the imposition of such a national tax does not conflict with the provisions of Article 401 of EU Directive 2006/112/EC. It shall become apparent that, when dealing with the acquisition of immoveable property situated in the Netherlands, the imposition of transfer tax is not a reason to impose formalities as if one is dealing with cross-border transactions. Both taxes can, in such instances, exist simultaneously. Bearing this in mind, the greatest cause of the issue at hand is detected.

Concurrence
My research deals with “concurrence”. This term is, in fiscal circles, generally accepted. In determining the transfer tax due, pursuant to the Law on the Taxation of Legal Transactions, there are many instances of concurrence with various levies in other tax legislation. The main instances are the rights concerning inheritance, gifts and transfers, and VAT. My research deals only with the concurrence of the imposition of transfer tax and VAT in transactions concerning immoveable property in the Netherlands.

Viewed from the purpose and intent of a transaction tax, such as transfer tax, and a consumption tax, such as VAT, it is self-explanatory that the transfer of immoveable property would be a natural starting point for the taxes. This is no different in the Netherlands where both taxes come into play with every transfer of immoveable property situated in the Netherlands.

Transfer tax is due on the acquisition of immoveable property situated in the Netherlands. VAT is, to the extent that it is of any importance, due on the supply of goods located in the Netherlands by a business. The term “goods” in the VAT legislation has its own interpretation which is not in line with the national civil law definition. In the Law on Turnover Taxes 1968, the term “goods” is defined as all tangible property and, therefore, includes immoveable property.
A great deal of imagination is not needed to realise that both taxes, by virtue of their respective characters, attempt to capture the transfer of immoveable property in the Netherlands. An immoveable property is consumed in the sense of the word “use” and the transfer of an immoveable property to a purchaser is a transaction. It is additionally not difficult to imagine that in situations concerning national transfers, the imposition of both transfer tax and VAT is undesirable. In order to eliminate or mitigate such double taxation, the legislator has implemented measures in the Law on the Taxation of Legal Trans-
actions, while being mindful of the workings of both taxes. He has, however, also made certain choices. The legal nature of the separate taxes has helped and certainly led the legislator on the way. I note that within a national tax, such as transfer tax, the legislator is in the first instance entirely free to determine the boundaries and content of the legislation. The freedom of the legislator within the framework of European legislation on VAT is noticeably more restricted. The Member States do have a certain freedom when, and only when, implementation is optional or the European regulations permit the Member States to determine the specific nature of the regulation in question.

The legislator has therefore designed an exemption within the Law on the Taxation of Legal Transactions. It has been determined that, under conditions to be further detailed in a regulation, a purchase falling to be a supply of goods pursuant to Article 11(1)(a)(1°) of the Law on Turnover Taxes 1968, or a supply of services pursuant to the closing paragraph of Article 11(1)(b), is exempt from transfer tax. Such exemption applies unless the property is used for business purposes and the purchaser, on the basis of Article 15 of the Law on Turnover Taxes 1968, can recover the whole or part of the VAT it incurs.

When one reviews the text of Article 15(1)(a) of Law on the Taxation of Legal Transactions, it is immediately apparent that the exemption from transfer tax is bound by “hand and foot” to the above-mentioned provisions of the Law on Turnover Taxes 1968. The life of an exemption from transfer tax depends, therefore, on the interpretation of one or more VAT provisions. The importance of researching the concurrence of both taxes on the transfer of immoveable property in the Netherlands is clear once one appreciates that the imposition of a quite differently structured tax, such as VAT, is decisive for the consequences of the imposition of transfer tax. With the results of my research, given the ingrained incongruity of these concepts, provisions and methods of taxation, those dealing with transactions concerning immoveable property in the Netherlands are observed from the point of view of applied law.

The exemption clause in transfer tax plays an important, if not a decisive, role in the purchase of immoveable property in the Netherlands and the conditions imposed by the parties involved. It is, intentionally, no secret that developers adapt the design or implementation of their plans in order to take advantage of existing legal provisions, particularly the exemption in the Law on the Taxation of Legal Transactions.

Taking into account the applicable rates, I consider it most valuable to consider and explore the room for maneuver available despite the fact that, from a political point of view, transfer tax should be transformed into a property tax. Issues, such as promoting the change of residence of owners of immoveable property and the discussion on the unlimited deduction of mortgage interest paid by owner-occupiers for the purposes of income tax, obviously play a role. I will not be dealing with such issues.

**Purpose and scope of the research**

The research is limited to the concurrence of the taxation of the transfer of an immoveable property in the Netherlands as a result of the Law on the Taxation of Legal Transactions and the Law on Turnover Taxes 1968. The research is logically set out respecting applied law. Furthermore, it has a comparative nature due to the differing fields of law that are dealt with. The research deals with national civil law terrain as well as the two different tax laws under the umbrella of European law. The research examines whether adherence to the underlying and differing legal concepts is workable and, given their complimentary nature, applicable in practice. This examination is carried out bearing in mind the differing sources of law that the legislator has made available when dealing with a transfer of immoveable property in the Netherlands under the previously mentioned taxes. The exemption clause in Article 15(1)(a) of the Law on the Taxation of Legal Transactions forms the core, or the pivotal point, of the research. All the elements of this clause are examined, which given the text of the provision, means that I will also consider the elements of the application of the laws on VAT included therein and shine a light on those provisions and include them in the conclusions and recommendations.
In the first instance in Chapter II – Transfer Tax, I provide an overview and analysis of the important provisions of the Law on the Taxation of Legal Transactions, as determined following my research. I will not ignore the European dimensions of VAT and the way in which this tax significantly influences the application of transfer tax. As a result, I describe and dissect, under a microscope where necessary, European legislation and case law. This is done in Chapter III – VAT.

I focus, in my research, on the tax legislation and, where necessary and useful, on the historical background as well as the case law and resulting changes in the legislation or regulations. When dealing with case law, the emphasis is on judgments of the Supreme Court of the Netherlands and the Court of Justice in Luxembourg. Given the connection of national civil law to the Law on the Taxation of Legal Transactions by the legislator, I shall regularly consider and include the workings, or influence, of such law in my reflections.

The emphasis, in my research, is more on the readability of my arguments, particularly when considering case law concerning the concurrence of the two taxes, rather than producing an endless list of judgments of the Supreme Court of the Netherlands and of the Court of Justice in Luxembourg. I believe this is possible to justify, as decisions of the judges of lower courts, as well as the comments of the members of the Parket have, to a sufficient degree, been recognised and referred to in the case law. Furthermore, my research considers the nature of transfer tax and VAT, the principles and directions of the (formal) legislator and regulator, as well as the crystallisation in law resulting from the final judgments of the highest judicial courts. I will not therefore, based on the same grounds, consider opinions including those laid out or discussed in “official” policy of the tax authorities as the body responsible for the implementation of tax legislation in the Netherlands.

The methodology
In order to answer my research questions, it has been necessary to research the relevant legislation independently and in connection with one another, being the Law on the Taxation of Legal Transactions and the Law on Turnover Taxes 1968. I have included, in my considerations, where these regulations come into contact with, and overlap, national civil law. Furthermore, I have brought these regulations together with, and researched them in light of, European Union law. To an extent, there is comparison of law and the placing of the entirety in a Community and supranational perspective. I have highlighted the rules of taxation of both taxes that are relevant for my research, set them side by side and discussed the differences in depth.

I have made reasoned arguments using, as a solution, the previously outlined “asymmetry” and, from the alternatives presented, I make a choice. Furthermore, I put forward reasoned simplifications on behalf of judicial practice. For this process, I have also studied literature, case law and “pseudo rules”. I have not, however, limited myself to the previously mentioned areas of law. I have drawn on my extensive experience in (university) teaching, both nationally and internationally, in these areas. I have also acquired knowledge and insight from publishing and editing of articles and (electronic) books. The divergent views and different approaches and appreciation of facts and circumstances that I have come across during the many years of contact with professional tax advisers have been invaluable in carrying out my research. My practical and legal insight, largely acquired while a tax inspector and judge at various (disciplinary) courts and organisations, has been of great use to me. I have also been present “at the birth” of many important and guiding judgments in the field of VAT and transfer tax. In order to achieve a meaningful conclusion for my research topic on the basis of the information I have collected and processed, I have chosen to concentrate on merely a few points of attention. I have set out here the subjects which are of special interest and have been given particular attention in my research.

In Chapter II – Transfer tax, I deal, in the manner previously described, with applied law that is relevant to my research and are related to the imposition of transfer tax in the Netherlands. This is necessary as this tax forms part of the research framework. After a short introduction, I discuss successively the civil law approach, the structural concepts of
“immoveable property” and “acquisition”, the limitations and extensions of “acquisition”, economic acquisition and, what I refer to as, “miscellaneous”, drawing to a close with a summary and conclusions.

As my research deals with the concurrence of transfer tax and VAT, I complete this in my chosen setting, in Chapter III – VAT. I deal with the aspects of applied law that are relevant to my research and are related to the imposition of VAT in the Netherlands. I pay a great deal of attention to the European dimension of this tax. Subjects which, after a general introductory section, receive particular attention are the taxpayer, the taxable events of a supply of goods and a supply of services, the immoveable property rules, the right to deduct input VAT and the transfer of all or part of a totality of assets. I end this chapter with a summary and conclusions.

In Chapter IV – Concurrence, I place the exemption, according to the provisions of Article 15(1)(a) of the Law on the Taxation of Legal Transactions, in a central position. In doing so, the two areas of law discussed in depth in the previous chapters are brought together and compared and the result assessed bearing in mind the intention of the article. Following an introductory and general section, I zoom in on, successively, immoveable property and immoveable goods, the supply of goods as defined by Article 11(1)(1°) of the Law on Turnover Taxes 1968, the supply of services as defined in the closing paragraph of Article 11(1)(b) of the Law on Turnover Taxes 1968 and the phrases “unless the good is used for business purposes” and “wholly or partially deductable”. The chapter ends with conclusions.

In Chapter V – Overview, Conclusions and Recommendations, I answer the questions as to whether change is desirable, whether it should be provided for in new legislation, if the answer is yes then which provisions should be reformulated and which amendments are required. I also answer the question as to whether further amendments are necessary and, finally, I conclude my research.

Conclusions
I have discussed the most important elements of the so-called concurrent regulation in my research. I have explained that the regulation, as set out in the Law on the Taxation of Legal Transaction, is condemned to the explanation and interpretation of concepts and provisions of an entirely differently characterised and structured Law on Turnover Taxes 1968 and that, on many points, the connection with the VAT provision is missed. The factors underpinning the application of the concurrent regulation become more divergent and are long unworkable. It appears from the research that certain friction exists when implementing the regulation. Such friction is not removed or resolved by the issuance of policy decisions by the responsible minister that, pour besoin de la cause, is richly blessed with acceptance. When one goes on in the same unworkable and limited vein, the regulation becomes unnecessarily complicated and eventually impracticable. This is accelerated by European case law in disputes concerning the imposition of transfer tax that are decided by an explanation of VAT. The pursuit of this already beaten path is inefficient and unproductive. I have demonstrated that this must change. The changes must be sought in the removal of the mandatory references in the Law on Taxation of Legal Transactions to concepts or provisions in the Law on Turnover Taxes 1968. A better legislative basis must be created for the application of the exemption as intended by the legislator. This can be done in a relatively simple manner. At a time in which politicians are concerned with the thinning out or simplification of regulations, words should be followed by action. I have set out and substantiated the approach. It is now up to the legislator to pick this up.

This research was completed on 1 January 2011. I have considered only the very important developments in this area following this date.
In memoriam

"Dream as if you'll live forever
Live as if you'll die today"1103

1103 J.B. Dean.

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