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BELGIUM

Law and Practice

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1. Types of Business Entities, Their Residence and Basic Tax Treatment

1.1 Corporate Structures and Tax Treatment

Most businesses adopt a corporate form, not only for tax reasons but also, and often primarily, for the benefit of limited liability. The most commonly used Belgian corporations offering limited liability are the closely held company (bv in Dutch; sp in French) and the limited liability company on shares (nv in Dutch; sa in French). Businesses not incorporated in the form of a limited liability company are either sole proprietorships or contractual arrangements offering no separate legal personality and no limited liability. These are all tax transparent, whereas corporations – even these that do not have limited liability – are taxed as such under the Corporate Income Tax (CIT) rules, which are part of the Income Tax Code of 1992 (ITC92).

1.2 Transparent Entities

Civil partnerships are often utilised to structure family assets (such as shareholdings, art collections and real estate), with a view to parents keeping control while all or part of the value is transferred to the next generation(s), and also in the construction industry to make a consortium to execute a large construction project. Economic Interest Groupings (EIG) or European Economic Interest Groupings (EEIG) are utilised to structure the supporting and/or ancillary activities (for the benefit) of two or more taxpayers. If taxpayers of several EU member states are participating in the Interest Grouping, an EEIG will be chosen; if only Belgian taxpayers are participating, or if non-EU taxpayers are participating, an EIG will be chosen. Otherwise, both types of Interest Groupings are governed by the same rules. If an EIG with non-Belgian members or an EEIG is established in Belgium, it should not create a permanent establishment in Belgium for the non-Belgian participants.

1.3 Determining Residence of Incorporated Businesses

Corporations are tax resident in Belgium if either or both of the following is located in Belgium:

- the place of effective management; or
- the principal place of business of the corporation.

Transparent entities are not subject to corporation tax, so the determination of their tax residence is not relevant. For civil law purposes, Belgian law will apply if the entity is governed by the relevant Belgian laws, provided the Belgian conflict-of-law rules do not make any other jurisdiction competent as governing law.

1.4 Tax Rates

Corporate taxpayers are taxed at the rate of 25%. Small and medium-sized enterprises (SMEs) are taxed at a rate of 20% on the first EUR100,000 of net taxable income (subject to certain conditions). Individuals are subject to a progressive scale of Personal Income Tax on the net income of their business: a first tranche of progressively taxable income is taxed at 0%, the next tranche at 25%, and so on. As soon as the total income that is taxable at the progressive rates exceeds approximately EUR41,060 (per annum), the top rate of 50% kicks in. Personal income tax rates are subject to a municipal surcharge of, typically, 5-10%, increasing the aggregate top rates to approximately 52.5-55%.

2. Key General Features of the Tax Regime Applicable to Incorporated Businesses

2.1 Calculation for Taxable Profits

The accounting profits are the basis for determining the taxable income of a corporation. On the one hand, there is an exhaustive list of non-deductible items, which are added back to the accounting profits (eg, most fines, most local taxes, the CIT itself, the non-deductible part of automobile costs, etc). A number of tax-exempt items are added to the retained earnings measured on the first day of the taxable year, so that the increase of retained earnings diminishes (or the decrease grows) (eg, tax-exempt capital gains on shares that qualify for the participation exemption). Finally, a number of specific tax attributes and tax incentives are deducted, such as dividends that are deductible by virtue of the participation exemption, net profits of permanent establishments that are exempt in Belgium by virtue of bilateral tax treaties, the Notional Interest Deduction, etc. Corporate taxpayers are taxed on an accruals basis.

2.2 Special Incentives for Technology Investments

In terms of CIT, two beneficial regimes exist in parallel:

- the old Patent Income Deduction, which allows a deduction of 80% of gross income from the exploitation of patents developed or improved in Belgium (applicable until 30 June 2021); and
- the new Innovation Income Deduction, which allows a deduction of 85% of qualifying innovation income determined in accordance with the OECD's nexus rules.

On wages for qualifying scientific workers, 80% of the statutory amount of Wage Withholding Tax does not need to be transferred to the tax collector, substantially reducing the "cost to company" for employing such workers.

2.3 Other Special Incentives

Belgium has an attractive tax regime for the financing of audiovisual and certain other creative works, allowing corporate investors in such projects to deduct their investments from their taxable income, up to certain thresholds. Belgium also has an EU-proof tonnage tax regime in place for the shipping industry. For the diamond industry, Belgium applies a so-called carat tax that offers a relatively low – to some extent notional – tax base for diamond traders. Group finance (or treasury) centres enjoy a beneficial regime for computing the 5:1 thin cap interest limitation (by netting interest owed or paid against interest earned or received). The Notional Interest Deduction – allowing Belgian corporate taxpayers to deduct from their taxable income an amount equal to a set percentage of their equity as if it were interest-bearing debt – was overhauled at the end of 2017 and is no longer considered to be an attractive tax incentive for taxpayers with high amounts of equity on their balance sheets.

2.4 Basic Rules on Loss Relief

Belgium allows Net Operating Losses (NOLs) to be carried forward with no time limits (no carry back). However, certain tax deductions, including NOLs carried forward from previous tax years, go into a basket and current-year profits over EUR1 million can be reduced by no more than 70% of the basket, leading to a minimum taxable income of 30% of the basket on income over EUR1 million. With the exception of capital losses on shares, capital losses are deductible from current income, as capital gains (again, with the exception of capital gains on qualifying shares) are taxable as ordinary income (albeit that the taxation of capital gains on fixed assets can be deferred, under strict conditions).

2.5 Imposed Limits on Deduction of Interest

Interest on non-mortgage loans with no fixed term – other than those paid to affiliated companies under a framework agreement for centralised treasury management within a group – is limited to the MFI interest rate published by the National Bank of Belgium (for loans up to EUR1 million with a variable rate and an initial interest rate up to one year provided to non-financial corporations), raised by 2.5%. All other kinds of interest must meet the arm's-length standard in order to be fully deductible. Any excessively high interest is not tax-deductible.

Then there is a 5:1 thin cap rule, whereby interest paid or owed, directly or indirectly, to related parties and/or lenders based in tax havens is deductible only to the extent that the tainted loans do not exceed five times the taxpayer's equity. Finally, the ATAD-compliant interest limitation rule has been transposed into Belgian national law, limiting the deduction of the "exceeding borrowing cost" (which is the positive difference between (i) all interest and other costs being economically equivalent to interest that are considered as a business expense, and (ii) any interest and other financial income being economically equivalent to interest that is included in the profits of the tax year and not exempt from tax in Belgium by virtue of a tax treaty) to either EUR3 million or 30% of the taxpayer's Belgian EBITDA, whichever is higher.

2.6 Basic Rules on Consolidated Tax Grouping

Under the so-called group contribution regime, corporate taxpayers that are 90% or more directly related (parent and subsidiary; sisters of the same common parent company) will be allowed to form a group, and a profitable member of the group will be allowed to transfer a portion of its profits to a loss-making member of the group, which will then remain effectively untaxed due to compensation with losses by the recipient entity. The entity transferring such profits will be required to pay the recipient company an amount in lieu of the CIT that it would have paid in the absence of the group contribution; this payment is not tax-deductible for the payer and not taxable for the recipient. This compensation has to be actually paid and cannot be booked as a debt. More specific details are explained in a circular letter, providing more certainty on matters such as the treatment of the compensation with foreign losses.

2.7 Capital Gains Taxation

In principle, capital gains are taxed as ordinary profits. The first exception is capital gains on qualifying shareholdings (as part of the participation exemption regime), which are 100% tax-exempt if the shareholding represents at least 10% of the share capital of the underlying company or has an (historic) acquisition value of at least EUR2.5 million, and has been maintained for an uninterrupted period of at least one year immediately preceding the disposal. The second exception is that capital gains on tangible fixed assets can be deferred, provided that the assets were on the taxpayer's balance sheet and have been depreciated for at least five consecutive taxable periods, and that the entire proceeds of the disposal – not only the capital gain – are invested into qualifying depreciable assets in Belgium or an EEA member state within three (or five) years following the realisation of the gain. The qualifying capital gain is not (immediately) taxed but is deducted from the tax base of the assets in which the proceeds of the disposal are re-invested. Depreciations will then only be allowed on this reduced tax base, resulting in the taxation of the temporarily exempt capital gain over time, as the newly invested assets are depreciated. This temporary exemption regime is usually referred to as a "rollover".

2.8 Other Taxes Payable by an Incorporated Business

Belgium applies the EU VAT system. A peculiarity is that, at the option of the lessor and the lessee, new buildings can be leased by VAT taxpayers to VAT taxpayers under the VAT regime, which was previously not possible. As a result, the lessor can deduct the input VAT paid on the development and construction of the building. It is expected that this option will be of interest whenever the lessee or tenant is a VAT taxpayer with a full or substantial right to deduct input VAT – ie, most regular commercial and industrial businesses other than financial institutions, insurance companies and investment funds.

Other transactional taxes are mostly "regionalised" and may differ depending on the region where the transaction is situated (Flanders, Brussels Capital Region, or Wallonia). For example, the sale of real estate triggers a real estate transfer tax of 10% in Flanders and 12.5% in Brussels and Wallonia.

The trading (but not the issuance) of shares and bonds and the like is subject to stamp taxes (with a relatively moderate cap per transaction).

Finally, there are – sometimes burdensome – regional and local taxes due on a variety of business activities. For example, many cities and municipalities impose a local tax on hotel rooms, engines, equipment and machinery, etc.

2.9 Incorporated Businesses and Notable Taxes

There are several other taxes that may be due, depending on the business operated by corporations (or unincorporated businesses) and the region where they are operating. For example, businesses selling certain goods packed in plastic or other packaging material (aluminium cans, etc) must pay a "recycling tax". Logistical operators may be subject to a special tax on trucks driving through one of the Belgian regions. In the wake of the financial crisis of 2008, banks are subject to a so-called bank tax. The operation of an "old" nuclear power plant is also subject to a "nuclear tax".

3. Division of Tax Base Between Corporations and Non-corporate Businesses

3.1 Closely Held Local Businesses

Because of the high marginal tax rates in the personal income tax system (over 50% on any aggregated income in excess of approximately EUR41,060 per year), inter alia, most businesses opt for incorporation, taking advantage of the lower CIT rates of 25% and 20% for the first tranche of EUR100,000 of taxable profits for SMEs.

3.2 Individual Rates and Corporate Rates

The distribution of profits in the form of dividends triggers a dividend withholding tax of 30% (a lower rate may be available under certain conditions), which is the final tax for a Belgian resident individual shareholder.

3.3 Accumulating Earnings for Investment Purposes

In essence, the most significant rule that would discourage the accumulation of earnings in a corporation (instead of distributing earnings in the form of wages/salaries or dividends) is the fact that capital gains on investment assets are taxable in the hands of corporate taxpayers, whereas capital gains on privately held investment assets (shares and other securities, real estate, etc) are normally tax-exempt in the hands of private individual taxpayers.

3.4 Sales of Shares by Individuals in Closely Held Corporations

Dividends, including liquidation gains, are taxed at 30%. If the distributing company is established in Belgium, this 30% will be levied in the form of a dividend withholding tax, which is the final tax for the individual shareholder. For dividends stemming from non-Belgian shares, either the Belgian financial intermediary will levy the 30% withholding tax, or the taxpayer will be required to declare the dividend income in his or her personal income tax return and pay 30% flat on this income.

Under certain conditions, a reduced rate of withholding or personal income tax may be available.

Capital gains on shares are normally tax-exempt in the hands of private individuals. Exceptions may apply – for example, if the taxpayer, together with his or her close family, owned more than 25% of the share capital in a Belgian company at any time during the five-year period immediately preceding the sale, and the shares are sold to a corporate buyer outside the EEA (the capital gains tax rate would then be 16.5%). Also, so-called speculative gains are taxable (at a flat 33% rate) if the individual shareholder has bought and sold the shares in a speculative way (eg, short holding period, borrowed funds to buy the shares, etc).

In 2019, the Belgian Constitutional Court quashed the so-called securities account tax, and a new securities account tax of 0.15% on securities accounts held by individual taxpayers was introduced in early 2021. The tax is due on securities accounts with an average value in excess of EUR1 million.

3.5 Sales of Shares by Individuals in Publicly Traded Corporations

See **3.4 Sales of Shares by Individuals in Closely Held Corporations**.

4. Key Features of Taxation of Inbound Investments

4.1 Withholding Taxes

The general withholding tax rate is 30%. Lower rates and even exemptions are available – for example, for dividends paid to qualifying parent companies established in countries with which Belgium has a bilateral tax treaty in force or for interest paid to so-called financial holding companies. Subject to certain conditions, a 15% or 20% rate applies to dividends paid by SMEs and related to shares issued in remuneration for a contribution in cash that took place after 1 July 2013. SMEs can also opt to create a so-called liquidation reserve that gives rise to an extra 10% corporate income tax due from the company, with no additional withholding tax due from the shareholder upon the liquidation of the company. Dividends paid out of this liquidation reserve prior to the liquidation of the company give rise to a 20% withholding tax if the distribution occurs within the five years following the creation of the liquidation reserve, and 5% if the distribution occurs after five years. A 15% rate applies to dividends paid by certain real estate investment companies.

4.2 Primary Tax Treaty Countries

Foreign investors in Belgian stock sometimes make use of (interposed) holding companies in Luxembourg or Hong Kong, among other locations, because a zero rate of Belgian withholding tax is available, and dividends leaving Luxembourg and Hong Kong are, by default or subject to further planning, exempt from withholding tax. The Belgian tax authorities will scrutinise these structures and refuse the zero rate in any case of clear treaty shopping. For interest-bearing instruments, the Netherlands and Luxembourg are sometimes used for the same reasons, but also with the same caveat for treaty shopping.

4.3 Use of Treaty Country Entities by Non-treaty Country Residents

As mentioned above, the Belgian tax authorities will scrutinise these structures and refuse the zero rate in any case of clear treaty shopping. In several advance tax rulings, the Ruling Commission has listed a number of criteria to test the reality and substance of interposed companies in jurisdictions such as Luxembourg.

4.4 Transfer Pricing Issues

Belgium will pay special attention to all significant internal dealings, such as the purchase and sale of raw materials and semi-finished or finished goods to and from related parties, but also to interest rates on intercompany loans and other financial arrangements and services provided by or to Belgian corporate taxpayers to or by non-Belgian related parties or parties (even unrelated) that are subject to no or low effective taxation.

4.5 Related-Party Limited Risk Distribution Arrangements

In the past, most limited risk distribution arrangements (eg, commissionaire structures) were commonly used and not aggressively scrutinised by the Belgian tax authorities, but this is rapidly changing, especially since Belgium decided in 2017 to opt in to the MLI provision on commissionaire structures (Article 12). Practitioners generally advise taxpayers to apply for an advance tax ruling from the Ruling Commission in order to prevent any dispute with the tax auditors afterwards.

4.6 Comparing Local Transfer Pricing Rules and/or Enforcement and OECD Standards

Belgium has adopted a somewhat far-reaching version of the Country-by-Country Reporting standard (BEPS Action 13), inter alia, by imposing CbC reporting for financial years starting on or after 1 January 2016. Other than this, the OECD standards are by and large adopted.

4.7 International Transfer Pricing Disputes

At the time of writing, there is no statistical data on the frequency of transfer pricing dispute resolution through double tax treaties and mutual agreement procedures (MAPs). However, these instruments were recently promoted by the Belgian Federal tax authority as key elements in dispute resolution. It is understood that the MAP process is still viewed as rather the odd-one-out in the field of dispute resolution since most tax officials have not had any experience with it yet. However, in 2020, the Belgian Federal tax authority decided to increase the capacity of its staff specialising in this matter, so there may be a fresh wind on this in the near future.

5. Key Features of Taxation of Non-local Corporations

5.1 Compensating Adjustments When Transfer Pricing Claims Are Settled

There is currently little or no experience in Belgium of compensating adjustments in connection with transfer pricing claims; how this will work out in practice remains to be seen.

5.2 Taxation Differences between Local Branches and Local Subsidiaries of Non-local Corporations

By and large, local Belgian branches are taxed on an equal footing with Belgian subsidiaries, with the only major exception being that Belgium does not levy any "branch profits tax" in lieu of the dividend withholding tax to which Belgian subsidiaries are subject when distributing dividends to their parent companies or non-resident (corporate) shareholders.

5.3 Capital Gains of Non-residents

Belgium does not impose (capital gains or other) tax on the sale of stock in a Belgian company by non-resident corporate shareholders. In exceptional circumstances, non-resident individual shareholders may be subject to Belgian capital gains tax on the sale of stock in Belgian companies, but not as a general rule.

5.4 Change of Control Provisions

Belgium does not have any change of control provisions that would apply to the disposal of an indirect holding in a Belgian corporation higher up the non-resident group or parent company. However, Belgium does have change of control provisions limiting the use of certain tax attributes – especially NOLs – by the Belgian corporation itself upon the occurrence of a change of control, unless such change of control is motivated by bona fide financial or economic reasons.

5.5 Formulas Used to Determine Income of Foreign-Owned Local Affiliates

Minimum taxable profit formulas are used for non-resident taxpayers operating in Belgium through a branch only if no tax return is filed, if the tax return is filed late, or if the bookkeeping is not in accordance with normal business practices. A comparison will then be made with at least three comparable taxpayers and an absolute minimum of EUR40,000 of taxable profit per year will be applied.

5.6 Deductions for Payments by Local Affiliates

Belgium does not have specific standards for determining the deduction for payments by local companies for management and administrative expenses incurred by non-local affiliates. Any reasonable formula (based on sales, staff, or any other reliable criteria) can be used.

5.7 Constraints on Related-Party Borrowing

Belgium has a 5:1 thin cap rule in place to limit the amount of deductible interest paid or owed by a local company – whether foreign-owned or not – to non-local ultimate beneficiaries. The interest on such loans (as well as on direct or indirect loans from lenders based in tax havens) is only deductible to the extent the tainted loans do not exceed five times the Belgian borrower's equity. In addition, for interest paid or owed directly or indirectly to tax-exempt or low-tax lenders, the burden of proof regarding the reality of the loans and the arm's-length character of the interest rate is reversed; if the Belgian tax authorities reject the deductibility of such interest, it is up to the taxpayer to prove that the loans are real and genuine, and that the interest rate is at arm's length.

6. Key Features of Taxation of Foreign Income of Local Corporations

6.1 Foreign Income of Local Corporations

Belgian resident corporations are taxed on their worldwide income, unless Belgium's right to impose tax is limited by any provisions of a bilateral tax treaty. The rule whereby foreign-source income that was not exempt in Belgium by virtue of a bilateral tax treaty was reduced to one quarter of the normal Belgian tax rate was repealed several years ago. Under specific circumstances, Belgium allows a foreign tax credit for dividends, interest and royalties that were subject to withholding tax in the source country.

6.2 Non-deductible Local Expenses

There are no specific rules in Belgium to attribute costs or expenses to foreign income that is exempt from corporation tax in Belgium pursuant to the application of a bilateral tax treaty provision. For example, interest on a loan to acquire foreign real estate is not non-deductible by default, even though the income from such real estate will normally be exempt in Belgium by virtue of the applicable tax treaty (if any).

6.3 Taxation on Dividends from Foreign Subsidiaries

In principle, dividends from subsidiaries (foreign or Belgian) are taxed in the hands of a Belgian corporate shareholder but, subject to several conditions, such dividends will be 100% deductible by virtue of the dividends-received deduction.

The main conditions for the dividends-received deduction to apply are that the participation must be at least 10% in the share capital of the subsidiary, or must have an historic acquisition value of at least EUR2.5 million, and that such participation must have been maintained for an uninterrupted period of at least one year (not necessarily prior to the distribution of the dividend). In addition, a complex subject-to-tax test applies to prevent dividends that have not been sufficiently taxed at the level of the subsidiary from being exempt in Belgium.

6.4 Use of Intangibles by Non-local Subsidiaries

Please see **2.2 Special Incentives for Technology Investments** and **9.4 Competitive Tax Policy Objective** regarding the two sets of specific rules to tax income from intangibles developed by local corporations (and that may or may not be used by foreign subsidiaries). Other than that, the normal transfer pricing rules apply, which require the foreign subsidiaries to pay arm's-length royalties or other remuneration for the use of such intangibles (as long as they are owned or licensed by the Belgian corporation). Also, the transfer of a locally developed intangible to a foreign affiliate will be required to be made on arm's-length terms, and a (taxable) gain may have to be recognised and will be taxed in Belgium accordingly.

6.5 Taxation of Income of Non-local Subsidiaries Under CFC-Type Rules

At the end of 2017, Belgium introduced CFC rules that are mostly in line with the EU's ATAD. However, practitioners are of the view that those rules will rarely apply because an arm's-length attribution of income to Belgium will normally follow from the application of the transfer pricing rules.

6.6 Rules Related to the Substance of Non-local Affiliates

There are no specific rules in Belgium to determine the substance of non-local affiliates, except the guidelines derived from a number of advance tax rulings in connection with interposed (mostly finance) companies in Luxembourg or other jurisdictions where interest, dividend or royalty income can, with some planning, be taxed at a low effective rate. These criteria are quite formalistic (book-keeping, office space, knowledgeable local directors, complying with local tax and company laws, etc). This does not mean that the syphoning off of "Belgian" profits to letterbox companies in low-tax jurisdictions will not be challenged on the basis of lack of substance in such jurisdiction, or even on the basis that such companies are effectively managed in Belgium and their profits are, therefore, subject to corporation tax in Belgium.

6.7 Taxation on Gain on the Sale of Shares in Non-local Affiliates

Under appropriate circumstances, Belgium exempts capital gains on shares in Belgian or non-Belgian affiliates. The conditions for this capital gains exemption are, by and large, the same as those that apply to the dividends-received deduction (see **6.3 Taxation on Dividends from Foreign Subsidiaries**).

7. Anti-avoidance

7.1 Overarching Anti-avoidance Provisions

Belgium has a General Anti-Abuse Rule (GAAR) in place. Transactions that are set up with the sole or predominant aim of benefitting from an advantageous tax rule (eg, a deduction, exemption, deferral, etc) or avoiding the application of a disadvantageous tax rule can be re-characterised by the tax authorities such that the advantageous rule is denied or the disadvantageous rule takes effect. If the tax authorities make such assertion, the taxpayer has the right to demonstrate that he or she had substantial non-tax motives for entering into the transaction the way it was set up.

8. Audit Cycles

8.1 Regular Routine Audit Cycle

In principle, Belgian corporate taxpayers are audited every other year. In most instances, corporate tax and VAT audits will be conducted simultaneously. Especially for larger taxpayers, data mining will be used to seek "suspicious" elements that would warrant a more thorough audit. There is a special audit team that focuses on transfer pricing; this team can identify potential targets on its own (with the help of data mining) or it can be informed by the local tax inspectorate if the latter believes that the taxpayer may have substantial transfer pricing issues. If there is a suspicion of fraud or aggressive tax abuse, the Special Investigation Service may start its own investigation, independent from the local tax inspectorate.

9. BEPS

9.1 Recommended Changes

The following BEPS recommended changes have already been implemented:

- Action 2 (anti-hybrid rule and anti-abuse rules);
- Action 3 (CFC regulation);
- Action 4 (financing cost surplus);
- Action 5 (innovation income deduction + common reporting standard);
- Action 6 (prevention of tax treaty abuse, implemented in Belgium through MLI);
- Action 7 (definition of "permanent establishment");
- Actions 8-10 (transfer pricing);
- Action 12 (mandatory disclosure of aggressive tax planning schemes);
- Action 13 (master file and local file reporting);
- Action 14 (participation in the mutual agreement procedure); and
- Action 15 (MLI).

9.2 Government Attitudes

The Belgian coalition government is generally in favour of BEPS – and the EU version of BEPS, ATAD I and ATAD II – and is seeking to comply with it without much "gold plating". Belgium wants to stay competitive for attracting inward investments from the most significant trading partners, such as the USA, Japan, Canada, Germany, France, etc.

9.3 Profile of International Tax

Since the publication of LuxLeaks, Panama Papers and similar reports, the public interest in international tax has grown substantially, which certainly increases pressure on the present coalition government to close a number of international loopholes (with BEPS-compliant anti-hybrid measures, the introduction of a BEPS-compliant interest limitation rule, etc). Please note that the EU Court of Justice has dismissed the "Excess Profit Rulings" case brought by the EU Commission against Belgium. The "Excess Profit Rulings" are not to be considered as prohibited state aid.

9.4 Competitive Tax Policy Objective

The Belgian legislator has already transposed the BEPS and ATAD measures without much "gold plating", to create a level playing field with other jurisdictions that offer similar non-tax benefits to potential or existing inward investors. A good example is the overhaul of the Patent Income Deduction (now nicknamed: Innovation Income Deduction), which includes the nexus-rule imposed by BEPS but widens the scope compared to the former regime and covers, inter alia, copyright-protected software (under the former regime, only income from patents was eligible for the beneficial regime, which entailed an 80% exemption of qualifying gross income, whereas the new regime exempts 85% of qualifying net income).

Also, the headline CIT rate has been reduced to 25%, in order to be competitive with jurisdictions such as the Netherlands and Luxembourg, which are often competing for the same inward investments as Belgium.

In addition, Belgium has an interesting tax regime in place for employing highly qualified researchers working in the R&D industry in Belgium by allowing the employer to keep 80% of the wage withholding tax that must normally be transferred to the Revenue Service for itself, thereby substantially reducing the gross cost of employing such workers. Only 20% of the normal wage withholding tax has to be effectively transferred to the Revenue Service, while the employees are entitled to credit 100% against their personal income tax liability.

Yet another strong feature of Belgium's international tax system is the participation exemption, which now exempts 100% of qualifying dividends (up from 95%) and capital gains deriving from qualifying participations in other Belgian or non-Belgian companies.

Last but not least, a well-functioning Ruling Commission allows for reliable advance tax rulings on all kinds of anticipated investments and other transactions (including unilateral and multilateral transfer pricing issues), creating advance legal certainty in areas of law where there would otherwise be a relatively large degree of uncertainty and "litigation risk".

9.5 Features of the Competitive Tax System

The most vulnerable feature of the Belgian (international) tax regime that remains after the transposition of BEPS and ATAD I and II is perhaps the so-called Expat Regime, which essentially provides for an attractive income tax regime for highly qualified workers temporarily seconded to Belgium. This regime is currently under revision, with a view to making it less vulnerable for state aid or other threats.

9.6 Proposals for Dealing with Hybrid Instruments

Belgium has already implemented rules to deal with hybrid instruments, defining what is to be understood by the term "hybrid mismatch".

Tax rules targeting hybrid mismatches cover the following, inter alia:

- hybrid mismatch arrangements – profits of an EU-based establishment realised through such an arrangement and that are not considered taxable in the permanent establishment's jurisdiction will be taxable at the level of the Belgian head office;
- hybrid entities – such entity incorporated or established in Belgium will be considered to be a taxable entity in Belgium if one or more associated non-resident entities is established in one or more jurisdictions that consider the Belgian entity to be taxable. The hybrid entity's income will be taxed in Belgium to the extent that it is not already taxed under the laws of Belgium or any other jurisdiction. This rule does not apply to collective investment vehicles; and
- hybrid mismatch payments – such payments are considered a non-deductible expense for the Belgian payer if the receipt thereof does not give rise to a corresponding inclusion at the level of the non-Belgian recipient.

While these new rules are very technical and complex, they would seem to be compliant with BEPS and ATAD, without causing too much overkill. It remains to be seen, though, how these highly technical rules will pan out in practice.

9.7 Territorial Tax Regime

Belgium does not have a territorial tax regime. A Belgian resident company is liable to CIT on its worldwide profits and income, while a non-resident company is taxed in Belgium on its Belgian-source income only.

9.8 CFC Proposals

Although Belgium has a worldwide tax system rather than a territorial one, it introduced comprehensive CFC rules at the end of 2017, which are mostly in line with the EU's ATAD. Under the Belgian CFC rules, non-distributed profits of a foreign company or establishment are added to the taxable income of a Belgian company/head office if and to the extent that such profits arise from artificial constructions that have been put in place for the essential purpose of obtaining a tax advantage. In line with ATAD, a construction is deemed artificial to the extent that the foreign company or foreign establishment does not own the assets, or does not undertake the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions that are relevant to those assets and risks are carried out and are instrumental in generating the controlled company's income.

Said CFC rules are defective in two significant ways. Firstly, practitioners are of the view that the rules will rarely apply because an arm's-length attribution of income to Belgium will normally follow from the application of the transfer pricing rules. Secondly, the above CFC rules may create situations of effective double taxation of the same income with different companies of the group. Neither the EU ATAD nor the Belgian implementation thereof determines how double taxation is prevented if Belgium and another member state simultaneously apply their respective CFC legislation.

There are multiple arguments that can be made against the introduction of a sweeper CFC rule into Belgian law. For example, it seems at least unfair to tax income of a foreign subsidiary with adequate substance just because it is a resident of a tax haven. In this respect, it must be noted that the Belgian rule excludes income of the CFC to the extent that it is realised through its own significant people functions.

9.9 Anti-avoidance Rules

In practice, it remains to be seen whether the double taxation convention limitation of benefit or anti-avoidance rules will have an impact in Belgium. In April 2018, Belgium's highest tax court (the Court of Cassation) ruled that income earned by a Belgian-resident sportsman from activities performed in the Netherlands remains tax exempt in Belgium (by virtue of Article 17 of the 2001 bilateral treaty between Belgium and the Netherlands), although the same income had not effectively been taxed in the Netherlands, and notwithstanding the "subject to tax" clause in the 2001 treaty. The inclusion of the subject to tax provision in Article 23(1) was seen as an anti-abuse provision, which should prevent double non-taxation.

9.10 Transfer Pricing Changes

The Revenue Service has increased its attention on transactions whereby IP assets are transferred out of the country. In a notorious case, the Special Investigation Team of the Belgian Revenue Service challenged the transfer of a patent application to a non-Belgian related entity as a "sham". The case was decided in favour of the taxpayer by the Tribunal of First Instance, but the Revenue Service has appealed the case. The Court of Appeal ruled recently again in favour of the taxpayer, stating that the transfer of the patent application had a real substance, rather than being a "sham".

9.11 Transparency and Country-by-country Reporting

Most Belgian practitioners are not opposed to transparency or CbC reporting, with the following stipulations:

- administrative formalities and red tape should be kept within reasonable proportions;
- the additional revenue that is expected to be generated by such systems should lead to a reduction of the headline (corporate) income tax rates and/or paying off Belgium's public debt (which currently exceeds 100% of the country's GDP), rather than to the creation of additional government spending; and
- when taxpayers comply with transparency and CbC reporting rules for several years in a row, they should earn a "compliant taxpayer" label and enjoy less cumbersome and time-consuming tax audits in return.

9.12 Taxation of Digital Economy Businesses

No statutory changes have yet been made, but Belgium supports the OECD's initiatives to consider certain "light" forms of presence in the country as a permanent establishment to which profit has to be allocated (and taxed).

9.13 Digital Taxation

The Belgian coalition government is in favour of a multilateral approach toward digital taxation, preferably in co-operation with the OECD or EU. However, in the absence of a multilateral agreement, the government has stated that it will impose a "digital tax" unilaterally as of 2023. Further details have yet to be announced.

9.14 Taxation of Offshore IP

Belgium has not yet introduced any provisions dealing with the taxation of offshore intellectual property.

De Langhe has four specialised tax attorneys in its tax team, all of whom handle Belgian corporate tax matters and tax litigation matters before Belgian courts, as well as the European courts. The firm is also dedicated to international tax matters, ranging from handling Belgian corporate tax work for inbound investors and assisting with non-Belgian tax work for outbound corporate clients, to handling EU and tax treaty work for all types of corporate clients (mostly advisory, but with some litigious work). The tax team also advises (and litigates) in matters that are directly linked to corporate tax work, such as transfer pricing, employee incentive plans and tax planning for company executives. The firm would like to acknowledge the contributions of Robbe Dumont and Lize De Corte.

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