Belgium

Branch Reporter
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Summary and conclusions

The *first part* of this report comprises a general overview of the Belgian withholding tax (WHT) system in the light of the general income tax system into which it is embedded. The income tax regime applicable, differs according to the taxpayer concerned (personal tax, corporate tax, legal entities tax and non-resident tax), whilst the WHT applicable differs according to the type of income concerned (movable income WHT, professional income WHT).

The movable WHT (MWHT) essentially applies to dividends, interest, royalties and income from renting or concessions. The professional WHT (PrWHT), applies to all kinds of income, essentially salaries and wages and other remuneration. Depending on the case, the WHT can either be a final tax or constitute a mere collection mechanism. As a general rule, both types of WHT are levied (withheld) by the income debtor who is defined as the withholding agent and who incurs liabilities in cases of incorrect withholding. Other withholding agents are designated for foreign-source income and in specific cases. The rule for the withholding agent is to withhold and pay the tax to the tax authorities. Reductions or exemptions of WHT only apply when all the conditions are met and duly reported by the beneficiary to the withholding agent. Refund procedures for taxpayers and recourse procedures for tax authorities are in place to cover cases of over-withholding or under-withholding, respectively.

The *second part* of this Belgian report, by far the longest one, details the Belgian WHT aspects of international transactions (Belgium as a source state, non-resident beneficiaries). As in the first part, it starts with a general overview of the WHT system under domestic law.

As for resident taxpayers, in many cases a WHT is levied. This WHT, in some instances, is the final tax whilst, in other cases, it is a mere advance payment. Interestingly, cases for which the WHT does not constitute the final tax can result either from mandatory regularisation (the most common situation) or from optional regularisation (i.e. situations in which the WHT is, in principle, the final tax for the foreign taxpayer, unless the latter opts for filing a tax return).

While MWHT is, in principle, levied on any movable income payments, many exemptions have been introduced over time for various reasons (EU directives, discrimination cases, etc.). Over the last decade, the non-discrimination rules embodied in the EU treaty have had a tremendous effect on the WHT landscape. In short, one can nowadays say that the tax treatment of foreign taxpayers (those established in the European Economic Area, in particular, and in third countries to some extent) should not be discriminatory compared with the tax treatment of Belgian taxpayers. Although the collection mechanism can be

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different, the final tax due should be equivalent (if not in favour of the foreign taxpayers – as reverse discrimination has not been an EU law issue so far). The discrimination analysis is not limited to nominal tax rates, but also addresses the taxable base (i.e. the deduction of costs in the source state). For instance, the tax treatment of CIVs and foreign holdings has changed due to EU case law. We might expect the same in other cases, such as the case of foreign insurance companies with respect at least to their unit-linked life insurance products. Looking forward, we would say that even the upcoming Belgian corporate tax reform might have to be slightly adapted, considering that the corporate tax rate might be lowered to below the standard MWHT rate at the risk of being quickly subject to an infringement procedure.

PrWHT is often used with respect to non-resident beneficiaries. Many cases exist in which PrWHT is only levied if the income beneficiary is a non-resident. The most relevant case in which a PrWHT could be applied in cross-border situations involving companies is the so-called "catch-all" clause, introduced in 2012 and narrowed down at the end of 2016. Before the catch-all clause had been implemented, there were situations in which a DTT allocated the taxing power over some income to Belgium, for which the Belgian internal tax legislation did not provide for any actual taxation. The catch-all clause was mainly intended by the Belgian legislator to fill the gap. It subjects to PrWHT (effective tax rate of 16.5 per cent) Belgian-source intra-group service fees paid to foreign service providers and it provides the latter with the possibility of optional regularisation.

Part three deals with the WHT treatment of Belgian-source movable income collected by foreign CIVs. In practice, considering the exemptions available with regard to interest income from bonds, only Belgian-source dividends are subject to MWHT.

Due to the significant increase in the MWHT tax rate over the years (from 15 per cent until 2011 to 30 per cent as of 1 January 2017 for listed shares), foreign taxpayers, including CIVs, are increasingly compelled to have recourse to double taxation treaties ("DTTs") to obtain the reduced MWHT rate.

DTTs concluded by Belgium generally provide that the source country (Belgium) will cap the MWHT to a maximum rate (either through a relief at source or a refund method). Belgium has not set in place any specific procedure for CIVs to apply the reduced DTT MWHT rates with regard to Belgian-source dividends. When a CIV cannot benefit from a DTT in its own right, its investors can hardly claim the DTT's benefits (either because the investors are simply not considered the beneficial owners, such as when the CIV takes the form of an investment company, or due to a lack of relevant elements of information provided by the CIV, as when the CIV takes the form of a contractual fund).

The relief at source procedure is rarely applied by foreign CIVs, and refund procedures are particularly burdensome and lengthy.

Part four addresses Belgian WHT issues with respect to the digital economy. Currently, the Belgian tax authorities will hardly be entitled to tax income derived by suppliers of digitised goods or services in the absence of a permanent establishment in situations in which the income does not qualify as royalties under internal tax law and for DTT purposes or when the income does not qualify as service fees.

1. Part One: Overview of withholding tax

1.1 General overview of the income tax system

The Belgian income tax system finds its source mainly in the Belgian Income Tax Code of 1992 ("BITC") and its implementing Royal Decree ("RD/BITC"). It comprises four types of income taxes: (i) the "personal tax"; (ii) the "corporate tax"; (iii) the "legal entities tax" (applicable to entities other than companies); (iv) the "non-resident tax" (comprising three subdivisions for individuals, companies and legal entities, respectively).

1.1.1 Personal tax

- *Total net income.* For inhabitants of the Kingdom, the taxable income consists of the total net income less some deductible expenses. The total net income is equal to the sum of the net income of the following four categories.
- *Immovable income.* The taxable amount of real-estate income is determined on the basis of either the cadastral income (a notional income deemed to represent the net annual income from the premises concerned) or the actual income, generally consisting of rent. The net amount is then obtained by deducting interest on some qualifying loans. Real-estate income has to be reported in the yearly personal tax return and is taxable under the progressive rate structure as applied to the total net income.
- Real estate or immovable WHT applies to most Belgian real estate. This regional tax is computed based on the cadastral income of the real estate and, despite its name, is made payable via an assessment notice. It cannot be credited against the federal income tax charge.[2]
- *Movable income.* Movable property income includes, without being limited to, dividends, interest, royalties, and income from renting, lease-farming or concessions.
- Dividends and income from savings certificates, deposits, bonds and other fixed-income securities are generally liable to a Belgian movable WHT ("MWHT") rate of 30 per cent at the time of collection (reduced rates for specific categories of income apply). No tax return has to be submitted by the beneficiaries in that respect (in light of the fact that a tax return has to be filed by the Belgian debtor or financial intermediary involved in the payment). However, a return must always be submitted for income earned and collected directly abroad and for taxable income not liable to MWHT. Net income from capital and movable property means the amount collected in any form whatsoever, before deduction of collection costs, custodial fees and other similar expenses, but increased with any MWHT.
- *Professional income.* There are seven categories of professional income: (i) employees' salaries and wages; (ii) company managers' remuneration; (iii) assisting spouses' remuneration (without own worker status); (iv) profits from agricultural, industrial and commercial activities; (v) proceeds from a liberal profession; (vi) profits and proceeds from former professional activities; (vii) replacement income: pensions, benefits under the unemployment-with-company-allowance regime ("early pension"), unemployment

[2] The real-estate WHT is not further addressed in this report.

benefits, health insurance benefits, etc.
- Most of these professional income categories are subject to professional WHT ("PrWHT") at various rates.
- *Miscellaneous income.* It includes all income with the common characteristic of not being earned through the exercise of a professional activity. It includes, without being limited to, the following categories: alimony payments, occasional profits and proceeds, income from services rendered in the framework of the "collaborative economy", prizes and subsidies, allowances granted to research workers, capital gains from built property, capital gains from land, and capital gains realised on the transfer of a "major holding interest".
- Miscellaneous income is generally taxed separately. Specific deductibility rules are in place for each category (either a percentage of actual expenses or lump-sum amounts). Some types of miscellaneous income are subject to WHT (MWHT or PrWHT).
- *Progressive rate structure v. separate taxation.* In principle, the personal tax due is determined by application of the progressive rate structure to the total net income of the four categories (tax rates range from 25 to 50 per cent).
- A separate taxation in respect of three categories of income nevertheless applies: (i) income from movable property; (ii) most types of miscellaneous income; (iii) certain types of non-periodic professional income. In such cases, the income escapes aggregation and is taxed at special rates: for income from movable property, the assessment rates vary between 0 per cent and 30 per cent (in practice, they match the MWHT rates applicable to the corresponding income); for miscellaneous income, tax rates vary between 16.5 per cent and 33 per cent; professional income that qualifies for separate taxation is often taxed at an average rate.
- Total aggregation is nonetheless applied when doing so is to the taxpayer's advantage.

1.1.2 Corporate tax

- *Globalisation of income and tax base.* Companies are liable to corporate income tax if three conditions are met simultaneously: (i) they have legal personality; (ii) they have their registered office, principal establishment or place of management or business administration in Belgium; (iii) they are carrying on a business or exercising a profit-making activity. Belgian companies are taxed on all their revenues, without any distinction between immovable, movable, professional or miscellaneous income (some exceptions exist, however, and the nature of the income may or may not trigger WHT). In general, the Belgian "accounting profit" serves as a basis for the computation of the "taxable profit", subject to several adjustments.
- *Standard and separate rates.* The normal corporate tax rate is currently 33.99 per cent (including supplementary crisis contribution). Reduced rates can be applied when the taxable profit does not exceed EUR 322,500.[3] A separate tax (0.412 per cent) has been introduced for capital gains on (qualifying) shares held longer than one year if realised by a company other than a SME. This separate tax cannot be offset with tax deductions

[3] As part of the upcoming tax reform, the standard corporate income tax rate of 33 per cent will be lowered to 25 per cent as from 2020. SMEs would even benefit from a further decrease in the rate to 20 per cent as from 2018 for the first profit tranche of EUR 100,000.

or losses and is a disallowed expense for corporate tax purposes.[4]

- Capital gains on (qualifying) shares that meet the upstream taxation requirement but not the minimum holding requirement are taxable at 25.75 per cent. Capital gains on non-qualifying shares (e.g. shares issued by a company in a tax haven) are fully taxable.
- *Belgian and foreign WHT*. Just like individuals, Belgian companies may suffer Belgian WHT (MWHT, PrWHT), although exemptions are applicable. Any Belgian WHT withheld on companies' income is, in principle, creditable and refundable. Advance tax payments can be made (a tax surcharge applies if no or insufficient advance payments are made). No foreign tax credit applies, except with respect to foreign interest income, subject to conditions. The foreign WHT is however deductible (only the net frontier income is subject to tax).
- *Fairness tax*. The "fairness tax" is a separate contribution that has been applicable since tax year 2014. Although it is a separate contribution, it is part of the corporate tax. It is only applicable if the following conditions are met simultaneously during a taxable period: (i) the company (not being a SME) has distributed dividends and (ii) the company's taxable profit has been partly or fully offset against notional interest or carry-forward tax losses. It applies if the dividend distributed is higher than or equal to the 33.99 per cent final tax base. The tax rate is 5.15 per cent. It applies to Belgian companies and to Belgian establishments of foreign companies.
- The question has been put to the Court of Justice of the European Union ("CJEU") whether the fairness tax should not be regarded as a WHT at source in the meaning of article 5 of the Parent-Subsidiary Directive ("PSD"), which provides that profits distributed by a subsidiary company to its parent company are exempt from withholding tax at source. The CJEU confirmed that the fairness tax is not a WHT given that the taxable person for the purposes of the 'fairness tax' is not the holder of the shares, but the distributing company.[5]

1.1.3 Legal entities tax

Three categories of bodies are liable to legal entities income tax: (i) those at the level of the State, Communities, Regions, etc.; (ii) certain institutions designated by name (regional public transport companies, etc.); (iii) certain companies and associations, particularly non-profit-making organisations that are not involved in profit-making concerns or transactions.

Legal entities are taxed only on limited items (depending on the category); for instance, on their income from movable property and on certain forms of miscellaneous income. The legal entities income tax is mainly collected by means of MWHT (or immovable WHT). When legal entities receive income from movable property or miscellaneous income of movable origin in respect of which no MWHT was deducted at source, then the MWHT is due by the recipient of the income.

[4] Under the upcoming tax reform, this separate 0.412 per cent capital gains tax on qualifying shares will be abolished.

[5] CJEU, 17 May 2017, X v Ministerraad, C-68/15.

1.1.4 General rules regarding MWHT and PrWHT

Under Belgian law, there are three types of WHT: MWHT, real estate/immovable WHT, and PrWHT. There is no “miscellaneous” WHT, even if some miscellaneous income is subject to either MWHT or PrWHT, depending on the nature of the income received.

- *MWHT*. In principle, MWHT on Belgian-source movable property income should be levied by the debtor (withholding agent). For foreign-source income, the MWHT is normally levied/paid by the financial intermediaries established in Belgium that are involved – in any capacity – in the payment of the movable property income. Financial intermediaries are not liable to withhold the MWHT if (i) they receive evidence that the MWHT has already been levied by a previous intermediary, if (ii) they provide evidence that the movable property income has been paid to a Belgian-resident credit institution, brokerage company or recognised clearing/settlement institution, or if (iii) they pay foreign movable property income (other than fees) to a “financial” enterprise established abroad.
- Over a period of a few years, the MWHT rate has been harmonised (i.e. same rates as a general rule now for interest, royalties and dividends) and considerably increased (from 15 per cent to 30 per cent since 2017). The reason for this is that the legislator wanted to simplify the regime, which has been done only partially.[6]
- *PrWHT*. The PrWHT is in principle levied by the debtor of the income (withholding agent).

1.2 Role of withholding tax in the domestic setting: collection mechanism versus final tax

The role of WHT in the Belgian income tax system differs according to the income tax concerned, on the one hand, and the type of WHT, on the other.

For personal tax purposes, the MWHT usually constitutes the final tax. PrWHT on the contrary, although computed in a manner that takes into account some aspects of the individual case (basic zero-rate band, family situation, tax credits, etc.), is essentially a collection mechanism: the amount of PrWHT withheld is fully credited against the personal tax due on the total net income that is subject to a progressive rate. For legal entities tax, the MWHT in principle also constitutes the final tax on income that is subject to such withholding.

For corporate tax purposes, the MWHT actually constitutes a mere collection mechanism because it is, in principle, creditable and refundable. Royalties, interest on loans and on debt securities and foreign-source dividends paid to Belgian companies are, in principle, not subject to MWHT. Generally speaking, only Belgian-source portfolio dividends and Belgian-source interest on cash deposits are commonly subject to a 30 per cent MWHT.

- *Policy reasons.* WHT is essentially collected for financial reasons (it is directly levied, while assessment takes time). WHT is also a means to limit non-compliance in terms of reported income. The fact that the WHT is withheld by a party other than the taxpayer will generally increase the state's revenues to the taxpayer's disadvantage. This is

6 The law indeed added layers of complexity by introducing new reduced MWHT rates for specific situations (essentially in favour of SMEs).

because tax matters are complicated, and there is often room for interpretation. In case of doubt, the debtor or the financial intermediary will indeed probably take the most prudent approach by either retaining the WHT (rather than not) or retaining the WHT on a higher tax base (because they themselves are exposed to liability in this respect). Another reason is most probably the ease of use and relative safety of the mechanism for the state: all the MWHT- and PrWHT-related compliance work has to be done by private actors (i.e. either the debtors of the income or the financial intermediaries), who may face severe penalties for non-compliance.

1.3 Legal status of the withholding agent

- *The debtor/financial intermediary as withholding agent.* As mentioned above, the MWHT imposed on Belgian-source movable property income is to be levied by the debtor.[7] As regards foreign-source income, this burden usually lies with the Belgian financial intermediary. On the other hand, the PrWHT is, in principle, levied by Belgian resident individuals, companies or legal entities that pay or grant salaries, wages or other income from professional services, pensions or allowances in their capacity as debtors, custodians, agents or intermediaries, and by non-residents for which salaries, wages, etc., that they pay or grant in Belgium or abroad are supported by an establishment they have in Belgium. Given their importance, we will only discuss the rules regarding MWHT in this section.
- Strictly speaking, the law does not exempt or mitigate MWHT obligations when the withholding agent (be it the debtor of the income or the financial intermediary) has difficulty with identifying the existence or terms of his withholding obligation. With respect to Belgian-source income, a Belgian income debtor is indeed assumed to know the taxable nature of the payment. As regards foreign-source income, however, the situation is more complex because the financial intermediary needs to rely on information received from the payer in order to assess the taxable nature of a payment. In a former circular letter, the Belgian tax authorities required the financial intermediaries to put in place specific methods of identifying foreign income (requiring information from the foreign debtor, and even from the Belgian beneficiary, if necessary).[8] That circular letter was quickly repealed due to 'interpretation issues'.
- In a more recent circular letter, the Belgian tax authorities stated, in more general terms, that "in practice, [the financial intermediary] should be informed in due time of the nature of the income to be paid out into the account in order to enable it to comply with its MWHT obligations"[9] – without a word about the consequences. In practice, the financial intermediaries usually apply a prudent approach and levy the MWHT when they have reason to consider that they are involved – in any capacity – in the payment of movable property income (it being up to the beneficiary then to claim the MWHT back if it was not legally due).
- *Reductions & exemptions.* Should any MWHT reduction or exemption be applicable, it will usually be conditional on the completion of certain formalities by the beneficiary of the

7 Art. 261, §1, 1° BITC.

8 Circular Letter No. Ci.RH.233/549.846 (AFER/AOIF 26/2004) of 11 June 2004, revoked due to interpretation issues by Circular Letter No. Ci.RH.233/549.846 (AFER/AOIF 41/2004) of 23 November 2004.

9 Circular Letter AGFisc No. 28/2014 (No. Ci.RH.233/632.229) of 2 July 2014.

income towards the withholding agent, i.e. provision of a certificate comprising specific statements. If such certificate has not been provided, the withholding agent will not be legally entitled to apply the reduced MWHT rate or the exemption.[10]

– *Liability and sanctions.* In case of non-compliance, the tax authorities can claim late payment interest at 7 per cent per year, impose administrative fines ranging from EUR 50 to EUR 1,250, try to argue that the Belgian debtor of the income undertook to bear the MWHT cost on behalf of the beneficiary and gross up the amount of the MWHT to be paid, with the resulting MWHT being a disallowed expense for tax purposes, try to argue that the reduction/exemption to which the beneficiary would normally have been entitled if all the formalities had been fulfilled in due time is not applicable, and increase the tax liability on the non-reported income with a penalty of 10 per cent up to 200 per cent. Criminal sanctions can also apply in some cases.

1.4 Procedural issues

1.4.1 Refund procedures for over-withheld tax

When the WHT (MWHT or PrWHT) is legally due, it is processed in the annual tax return and any excess paid over the tax due (in practice, on the total net income) is refunded.

If the MWHT was not legally due (e.g. because the payment was wrongly identified as movable property income by the financial intermediary), then the beneficiary has 5 years to file a claim to recover the amount.

"Moratorium interest" at 7 per cent per year is, in principle due upon refund of WHT (MWHT or PrWHT). However, no moratorium interest is due, for instance, if the amount is lower than EUR 5 a month; if the WHT is refunded to the beneficiary of the income, at the latest, at the end of the second month following the end of the normal assessment period; if the WHT is refunded to the withholding agent.

1.4.2 Recourse for revenue authorities

The withholding agent, in principle, remains liable for paying the MWHT, except when the MWHT reduction or exemption has been unduly applied by the withholding agent for having received a wrong certificate, in which case the MWHT liability is shifted to the beneficiary of the income.

In addition, taxpayers subject to personal tax must declare, in their yearly tax returns, movable property income in respect of which no MWHT has been effectively levied.

Basically, the same goes for Belgian companies that must declare all their income in accordance with their Belgian GAAP account.

However, if the movable property income has been paid in a gross amount to a taxpayer subject to legal entities income tax, then the withholding liability is shifted to that taxpayer (and thus the initial withholding agent is relieved of its obligation).[11]

[10] Circular Letter AGFisc No. 5/2015 (No. Ci.RH.233/634.435) of 2 February 2015.

[11] Art. 262, 1° BITC as interpreted by Cass. 9 January 2015, F.12.0117.

2. Part Two: Withholding tax for international transactions

2.1 Under domestic law

2.1.1 General overview of the system

Whereas Belgium taxes its residents on their worldwide income, non-residents are only taxable on Belgian-source income. Non-resident tax comprises three subdivisions for individuals, companies and legal entities, respectively (same structure as for resident taxpayers). The tax rates are, in principle, the same for residents and non-residents.

The taxation of non-resident taxpayers can take different forms.

In some cases, no WHT (MWHT or PrWHT) is levied, but the taxable income has to be mentioned in a yearly income tax return (e.g. business profits realised by a Belgian establishment of a foreign company).

In other cases, a WHT is levied. In some instances, this WHT constitutes the final tax whilst, in other cases, it constitutes a mere advance payment. Cases in which the WHT does not constitute the final tax can result either from mandatory regularisation (i.e. mandatory filing of a tax return in which the income is reported and according to which the final tax due will be credited against the WHT levied, with any excess, in principle, then being refunded) or from optional regularisation.

2.1.2 Types of income subject to withholding

2.1.2.1 Movable WHT

- *As a rule, the WHT is set at 30 per cent.* As mentioned above, movable property income includes, among other income, dividends, interest and royalties. These types of income in principle trigger a MWHT of 30 per cent.
- *Possible exemptions.* The most commonly applied MWHT exemptions concern Belgian-source dividends, interest and royalties paid to non-resident parent or associated companies pursuant to the implementation of the PSD and the European Interest & Royalties Directive.[12]
- Recently, a general anti-abuse rule ("GAAR") has been introduced into Belgian legislation. As a result, the MWHT exemption will be denied whenever the dividends originate from legal acts or a series of legal acts that are artificial (i.e. no valid business reasons that

[12] Council Directive 2003/49/EC of 3 June 2003.

reflect economic reality) and which are merely in place to obtain the MWHT exemption.[13]

- The application of the PSD to dividend payments has been extended to include non-EU-resident companies. Dividends distributed to a country that has concluded a tax treaty with Belgium containing a qualifying exchange of information clause can be exempt from MWHT, subject to the same conditions as those laid down in the PSD.
- Another important MWHT exemption on dividends concerns foreign pension funds
- Other exemptions exist (e.g. Belgian-source interest income on bonds (either registered or dematerialised and held within the Belgian "X/N securities settlement system") paid to "non-resident savers"[14]).
- *Reduced rates.* Some reduced rates are available under domestic law. There is, for instance, a 1.6695 per cent rate on dividends distributed by a Belgian company to non-resident minority corporate shareholders, subject to conditions (among others, that the MWHT cannot be credited or is not refundable in the jurisdiction of the beneficiary).
- Other reduced rates apply (e.g. the new 10 and 15 per cent MWHT rates applicable to SMEs under specific conditions, i.e. the "VVPRbis" regime and the "liquidation reserves" regime).
- Finally, a reduced MWHT rate can apply on the basis of the applicable DTTs.

2.1.2.2 *Professional WHT*

- *General.* As in the case of Belgian residents, PrWHT is often used with respect to non-resident beneficiaries (mostly on remuneration, pensions and income that is considered equivalent). Many cases exist in which PrWHT is only levied if the income beneficiary is a non-resident, including (without limitation):
  - occasional profits and proceeds collected in Belgium by non-resident individuals (30.28 per cent of the gross amount);[15]
  - proceeds from a liberal profession;[16]
  - profits resulting, even without the involvement of a Belgian establishment, from transactions dealt with in Belgium by foreign insurers;[17]
  - income, whatever the classification, from the activity carried out personally in

[13] On 27 January 2015, the EU Council adopted Directive 2015/121, a proposal of the European Commission to amend the Parent-Subsidiary Directive 2011/96/EU to incorporate, among others, a general anti-abuse rule ("the PSD GAAR") into the existing directive. As a result, and based on the Belgian implementation of such rule, the Belgian WHT exemption will be denied whenever the dividends originate from legal acts or a series of legal acts that are artificial (i.e. no valid business reasons that reflect economic reality) and which are merely in place in order to obtain the WHT exemption. Note that this rule is not only applicable in a European context, but also in a domestic context and in situations involving companies in third countries (i.e. countries outside the EU).

[14] Foreign taxpayers not having allocated the assets that produce income to the exercise of a professional activity in Belgium (i.e. to a Belgian establishment).

[15] Art. 87, 5°, a) RD/BITC.

[16] Art. 87, 5°, b) RD/BITC.

[17] In such a case, a 3.4 per cent PrWHT is levied on the gross insurance premiums collected and this PrWHT constitutes the final tax. This taxation will apply in the absence of a DTT, or even in the presence of a DTT if it contains a specific provision allowing such taxation.

Belgium by non-resident artists or sportsmen in that capacity;[18]
- income from the provision of any other services not specifically taxed at the level of non-residents under other provisions of the law (33 per cent on the income after deduction of 50 per cent lump-sum expenses) – see below for detailed information on this "catch-all clause";[19]
- profits resulting, even without the involvement of a Belgian establishment, from the alienation or leasing of immovable property situated in Belgium and the incorporation or transfer of a long-term or property right (tax rate ranging from 26.75 per cent to 53.50 per cent for individuals, and a tax rate of 33.99 per cent for companies).[20]

In the following paragraphs, we thought it was interesting to develop the most relevant case in which a PrWHT could be applied in cross-border situations involving companies, i.e. the so-called "catch-all" clause.

- *Catch-all clause.* The "catch-all clause" has been enacted through the Act of 13 December 2012 and the Royal Decree of 4 March 2013 and amended by the Act of 18 December 2016.
- Before the catch-all clause was implemented, there were situations in which a DTT allocated the taxing power over some income to Belgium, but for which the Belgian internal tax legislation did not provide for any actual taxation. With the "catch-all clause", the main purpose of the Belgian legislator was to fill the gap, i.e. to make sure that Belgium could exercise its taxing power on the basis of its domestic tax rules in all situations in which the DTTs in force allocate that power to Belgium. The catch-all clause derives its name from the fact that it provides for taxation in those cases for which the BITC did not already stipulate specific tax rules. But, under pressure from the Council of State, the initial scope of application was extended to situations without a DTT, so as to avoid discrimination between countries with which Belgium concluded or did not conclude a DTT. In the absence of a DTT, no taxation applies under the catch-all clause provided that the non-resident beneficiary can demonstrate that the income is (or will be) effectively taxed in the residence state.
- In essence, the catch-all clause applies if the following conditions are met simultaneously:
  - The income stems from "any provision of services", i.e. any operation that is not a supply of goods;
  - The income qualifies as benefits or profit in the hands of the non-resident beneficiary;
  - The services are provided to an individual tax resident in Belgium within the framework of his business activity, to a company, to a taxpayer subject to legal entities tax or to a Belgian establishment;

18 The situation of non-resident artists, sportsmen and researchers is interesting because they enjoy an optional regularisation regime (i.e. the possibility to file an income tax return), alongside the WHT system. This system is the Belgian answer to a 2008 Commission's reasoned opinion. Besides artists and sportsmen, the optional regularisation system was also introduced with respect to personal indemnities collected by non-resident individual researchers from the exploitation of a discovery.

19 Art. 228, §3 BITC.

20 Art. 228, §2, 3°, a) BITC and art. 87, 8° RD/BITC. When a non-resident company realises a taxable capital gain on Belgian real estate, a PrWHT of 33.99 per cent is levied by the notary public and paid to the tax authorities. This PrWHT applies irrespective of whether the non-resident company has a Belgian establishment. This PrWHT is then creditable against the tax due based on a non-resident corporate income tax return.

- There are (in)direct links of interdependence between the foreign supplier and the Belgian client;
- Such income is taxable in Belgium under a DTT or, in the absence of a DTT, if the non-resident taxpayer does not provide evidence that the same income is effectively taxed in the residence state.

When these conditions are met, a PrWHT of 33 per cent (potentially reduced on the basis of the applicable DTT) is levied by the debtor of the income after deduction of 50 per cent lump-sum expenses (an effective tax rate of 16.50 per cent thus applies).[21]

Such PrWHT constitutes the final tax for the non-resident taxpayer unless the latter chooses to file a non-resident tax return (optional regularisation regime). The non-resident taxpayer does have the possibility to file a non-resident income tax return in Belgium, almost "as if" it had a Belgian establishment to which the income covered by the catch-all clause was allocated. This choice is final and irrevocable for the given taxation year and is binding on the taxpayer. If the taxpayer decides to regularise some of the income covered by the catch-all clause, then the taxpayer must also report all other benefits or profit referred to by that provision, in addition to the income that is mandatorily subject to regularisation pursuant to other non-resident tax provisions.

The possibility to file a non-resident tax return potentially allows the non-resident taxpayer to take into account the professional expenses linked to its taxable income in Belgium. As of today, however, it is not at all clear what expenses one can/could take into account in Belgium when applying the global assessment with this new provision.

It is interesting to note that, in the BEPS era, this catch-all clause, although it was not its (declared) objective, may prove to be a very effective weapon for combating the use of companies based in a tax haven. This is because Belgium has not concluded a DTT with most of the tax havens and, absent any taxation in these countries, the PrWHT will be applicable. This is, however, less true since the amendment enacted by the Act of 18 December 2016, according to which this rule no longer applies for payments made to third parties.

2.1.3 Source rules for different types of income

Since the WHT applies to cross-border payments of income, the question of the source rules for each type of income (i.e. interest, dividends, royalties, rental fees, service fees, employment income) is key. In general, under Belgian law, a movable income payment will be considered as sourced in Belgium and therefore potentially subject to MWHT when the debtor is a resident of Belgium (when the income is not charged to the results of a foreign establishment of the debtor) or a Belgian establishment of a non-resident taxpayer.

In both cases, the WHT will only be levied provided that the income is actually taxable in Belgium pursuant to internal tax law or the applicable DTTs.

2.1.4 Tax base and tax rates (gross v. net income)

In this respect, we refer to the previous sections.

With respect to the tax base used for the WHT, a distinction has to be made between

[21] Art. 248, §3; 270, 7°; 271, 1° BITC, art. 87, 5°, f) RD/BITC and its Appendix III.

MWHT and PrWHT. For MWHT the income from capital and movable property means the amount collected in any form whatsoever, before deduction of collection costs, custodial fees and other similar expenses. In other words, the MWHT is computed on a gross basis and this is done for both resident and non-resident taxpayers. The PrWHT is usually levied on the gross taxable income paid or attributed, yet in some cases a lump-sum deduction of expenses applies.

2.1.4.bis Anti-abuse rules and WHT

As already explained, some movable income payments may, in some cases, be exempt from MWHT or benefit from reduced rates. In all these situations, the Belgian tax authorities may check as to whether the required conditions have been met and apply, if appropriate, some anti-abuse rules. We have already briefly explained the new EU PSD GAAR. We explain below some of the other rules that could be used in a WHT context.

– *Domestic general anti-abuse rule (GAAR)*. First, the Belgian tax authorities could use the domestic GAAR, i.e. article 344, §1 BITC, according to which there is tax abuse when the taxpayer carries out, by a legal act or series of legal acts it conducted, one of the following transactions: (1) a transaction by which it places itself, in breach of the objectives of a provision of the BITC or decrees taken in execution thereof, beyond the scope of this provision; or (2) a transaction by which it claims a tax benefit laid down by a provision of the BITC or the decrees taken in execution thereof, which would be contrary to the objectives of this provision and whose essential purpose is to obtain this benefit.
– This provision applies to the various income taxes collected in Belgium, whether collected by withholding at source or by tax assessment.
– *Sham doctrine*. The Belgian tax authorities could also try to invoke the existence of simulation ("sham"), which is a notion derived from Belgian civil law. In general, simulation occurs when parties perform an ostensible act whose effects both parties agree to modify or reverse by signing a secret agreement. Sham implies two agreements existing simultaneously, one which is concluded with the sole intention to deceive. There is only one real agreement, i.e. the secret agreement.
– The decisive criterion to identify a sham is whether or not the ostensible act is genuine, i.e. corresponds to reality. If this is not the case, it has to be determined which agreement was really signed by the parties. An act is deemed genuine when both parties have accepted its – legal – consequences.
– *Beneficial ownership*. Finally, the Belgian tax authorities could also refuse a MWHT exemption or a reduced MWHT rate when the recipient is not the "beneficial owner" of the income. This concept is strongly debated in Belgium, although still without any legal basis in Belgian tax legislation, which provides no legal definition for the concept of "economic beneficiary". This concept can, however, be found in the DTTs concluded by Belgium (more exactly, in the articles of the DTTs relating to dividends, interest and royalties), as well as, in particular, in the EU Interest & Royalties Directive.
– In the Belgian tax authorities' commentaries, the "beneficial owner" is described as the legal owner or the usufructuary of the instruments producing the income (completed by the notions of creditor, lender or depositor with regard to the interest)[22]. It follows from

[22] Com. Conv., No. 10/231, No. 11/231 and No. 12/203.

this description that the Belgian tax authorities are, in principle, in favour of a legal interpretation: in principle, only the person holding a title to the assets that produce the income can be considered as the beneficiary.
– In 2006, the Minister of Finance stressed the fact that the Belgian tax authorities would continue using a strictly legal interpretation of the concept of "beneficial owner" and that it should thus always be checked as to whether the recipient of the income has a legal document of ownership over the assets producing the income.[23] Some case law follows this traditional approach. One cannot exclude the fact that the Belgian tax authorities are reconsidering their interpretation of this concept in the new BEPS era.

2.1.5 Withholding tax obligations for non-resident payers

There is generally no obligation (not even a possibility based on a strict wording of the law) for foreign payers (i.e. a foreign debtor or a foreign financial intermediary without any Belgian establishment) to deduct any withholding tax and pay it to the Belgian tax authorities; whether the payment is made to the benefit of a resident taxpayer or a non-resident taxpayer. In other words, in the current state of the law, the MWHT may only be withheld by Belgian taxpayers (or a Belgian establishment of a non-resident taxpayer) and the PrWHT can only be withheld by foreign taxpayers in very specific cases.

That being said, we have seen a recent evolution concerning the Belgian tax on stock exchange transactions ("TSET"). This very old tax was, until recently, limited to transactions involving securities held in Belgium (i.e. via a Belgian financial intermediary). This has changed recently because the scope of the TSET has been extended to cover 'foreign platforms' as well. Foreign brokers – and, more generally, foreign financial institutions carrying out securities transactions on behalf of Belgian investors – may now, under certain conditions, withhold the TSET and pay it to the Belgian tax authorities.

The question is whether this might have an impact on the MWHT and PrWHT regimes going forward. In our view, precluding foreign financial institutions from levying the MWHT on foreign source income is in breach with EU law, in particular the freedom to provide services.

2.1.6 Recourse for revenue authorities

If the withholding agent (in general, the Belgian debtor) has failed to collect the WHT, the Belgian tax authorities may collect it with the imposition of penalties (cf. part 1).

2.1.7 Money laundering

Under the anti-money-laundering ("AML") legislation, specified institutions have a duty to cooperate in order to detect suspicious transactions and report them to an authority created for this purpose, i.e. the Financial Intelligence Processing Unit (CTIF-CFI). In such a case, they have to inform CTIF-CFI before executing the transaction. If the matter is serious or urgent,

[23] Parliamentary Question No. 802 of 28 March 2006.

the CTIF-CFI may, should such action be deemed necessary, freeze a transaction. This freezing order shall halt the execution for a maximum of five business days from the time of notification. If the CTIF-CFI finds that this measure must be extended, it immediately refers the matter to the competent Public Prosecutor. Upon a decision of the relevant judicial authorities, the frozen assets can then be seized.

The freezing of assets under the AML legislation does not, in our view, qualify as a WHT for domestic and or DTT purposes because it has not been established in Belgian taxation law. The same goes for criminal sanctions (leading to the seizure of assets).

2.2 Under treaty law (DTTs and EU law)

Belgium is one of the countries that signed the Multilateral Convention ("MLI") at the OECD meeting in Paris on 7 June 2017. The MLI could have a significant impact on corporate structures, financing and other arrangements involving treaty-reduced WHT. In particular, a tax authority may, on the basis of the "principal purposes test" ("PPT"), deny the benefits of a tax treaty when it is reasonable to conclude that, having considered all the relevant facts and circumstances, one of the principal purposes of an arrangement or a transaction was to obtain a benefit under a tax treaty.

In this context, it is important to note that Belgium chose to apply this "principal purposes test" as a measure to prevent treaty abuse, instead of simplified or detailed Limitation on Benefits provisions. Also, Belgium did not make any reservation regarding "Dividend Transfer Transactions".

2.2.1 *Types of income subject to WHT*

DTTs concluded by Belgium organise the taxing powers between the contracting parties, but do not stipulate the taxing method (withholding or assessment) nor the tax base.

The CJEU confirmed in several instances that the withholding method can be an appropriate (i.e. non-discriminatory) method in cross-border situations.[24] Besides, to paraphrase Kokott, the Advocate-General, in the Brisal case, it cannot be inferred from the OECD Model Tax Convention that, in general, the source state should be obliged to tax gross income. For instance, with respect to dividends (article 10) and interest (article 11), it merely provides that the source state – in addition to the State in which the recipient is resident – may tax the income, albeit that this tax must not exceed a specific percentage of the gross amount of such income. However, this merely sets a maximum amount as regards the outcome of the tax, and does not give the source state any instructions as regards taxation.[25]

As a result, provided Belgium has the right to tax pursuant to the applicable DTTs and does tax in a non-discriminatory way, then the taxing methods provided by the Belgian internal tax law are not impacted by DTTs.

24 CJEU, 22 December 2008, Truck Center SA, C-282/07; more recently CJEU, 13 July 2016, Brisal, C-18/15.

25 See, with respect to interest, the opinion of the Advocate General, Kokott, of 17 March 2016 in Brisal, C-18/15, point 60.

2.2.2 *Impact of EU case law on the Belgian MWHT regime*

We address here the many EU law discrimination cases with respect to MWHT and (pending) reactions from the Belgian legislator. It concerns a variety of situations involving different types of taxpayers.[26]

- *Investment companies or CIVs ("Commission v. Belgium")*. Belgian regulated investment companies are only taxable, by way of derogation to the standard rules, on the total amount of the abnormal and gratuitous benefits received and certain disallowed expenses. They are thus not taxable on the income they derive from capital and movable assets. In addition, those investment companies were, until recently, able to credit, in their corporate tax returns, the MWHT levied at source and, considering that the potential surplus of the MWHT was refundable, those companies were, in practice, not levied any income tax at all.
- Since these rules do not apply to foreign regulated investment companies, they are not legally allowed to deduct or recover the MWHT collected in Belgium on the dividends received so that this MWHT constituted the final tax with respect to movable income payments.
- As a consequence, the financial returns of the foreign investment companies (incurring the MWHT on Belgian dividends) were thus lower than those of Belgian investment companies (for which the MWHT was a mere pre-funding cost), all other things being equal.
- The judgment rendered by the CJEU on 25 October 2012[27] confirmed that such a difference in treatment was discriminatory under the fundamental freedoms guaranteed by European law.
- The reaction of the legislator was somewhat surprising. Where we could have expected the legislator to extend the *de facto* exemption on Belgian-source dividends to comparable regulated foreign investment companies, the legislator chose the alternative way, which consisted in making sure that the MWHT levied on Belgian-source dividends paid to Belgian regulated investment companies henceforth constitutes the final tax for them (without any credit or compensation whatsoever at the level of the shareholders of the fund).
- The discrimination under European law has thus been abolished, be it through a 'generalisation' of the double, or even triple, economic taxation on Belgian dividends (taxation of the Belgian operational company at the corporate tax rate of 33.99 per cent, and taxation of the Belgian SICAV on the Belgian dividends received at the MWHT rate of 30 per cent, to which is added another taxation at a MWHT of 30 per cent in the case of dividend distribution by such SICAV!).
- In addition, it is striking to witness that this legislative change is in contradiction with the generally accepted principle according to which investment companies, given their nature, should not generate any "tax leakage" between the underlying investments and the ultimate investors. This is one out of the many inconsistencies to be found in the Belgian tax treatment of CIVs in particular, and in the taxation of savings in general.
- *Holding companies ("Tate & Lyle")*. Belgium applies the mechanism provided by the PSD for the elimination of double taxation of dividends in cross-border situations, as well as in

[26] Considering the context of this article, we have not described cases concerning individuals here.

[27] CJEU, 25 October 2012, Commission v Belgium, C-387/11.

internal situations. When the investment value of a holding interest reaches 10 per cent (among other conditions), the dividend paid by the Belgian subsidiary to the (Belgian/ foreign) parent company is exempted from MWHT. At the level of the Belgian parent company, 95 per cent of the gross dividend so received is excluded from the corporate tax base (leading to a maximum effective tax rate of 1.7 per cent,[28] knowing that the company's professional expenses, if any, might further reduce its tax base). At the level of the foreign parent company, the exemption of MWHT means no non-resident tax at all.

– A difference in treatment occurred when the parent company held an interest of more than EUR 2,500,000[29] but less than 10 per cent in the Belgian subsidiary (a situation not addressed by the PSD). In such a case, the dividend paid by the Belgian subsidiary to the (Belgian or foreign) parent company was subject to the full MWHT rate (possibly reduced under a DTT in the case of a foreign parent company). At the level of the Belgian parent company, 95 per cent of the gross dividend so received was excluded from the corporate tax base (maximum ETR of 1.7 per cent) and the MWHT initially levied was creditable and any surplus refundable. To the foreign parent company, the MWHT (after DTT reduction) constituted the final tax.
– The CJEU's order of 12 July 2012[30] confirmed that the difference in treatment was discriminatory.
– This time, the Belgian legislator reacted by extending to foreign companies its mechanism for the elimination of double taxation, i.e. by reducing the MWHT rate applicable to foreign companies to 1.7 per cent.[31] With the deduction of costs set aside (authorised for resident companies, but still prohibited for non-resident companies), the difference in treatment has thus been resolved.
– Note the diametrically opposite reactions of the legislator in the case of investment companies (double economic taxation for everyone) and in the case of holding companies (mitigation of the double taxation for everyone). All taxpayers are not equal as far as the avoidance of double economic taxation is concerned.
– *"Investment-holding" companies.* The two aforementioned situations enable us to address a third situation, namely that of the foreign investment companies that hold an interest of more than 10 per cent in Belgian companies. This situation typically comes along in cross-border, master-feeder structures in which a foreign investment company has an important shareholding in a Belgian investment company or in the case of real-estate funds (REITs) where foreign REITs hold Belgian SPVs whose purpose is to own a building.
– As mentioned above, European parent companies holding an interest of more than 10 per cent in a Belgian subsidiary benefit, in principle, from an exemption of MWHT on Belgian dividends. However, such an exemption is only applicable if the foreign company is, among other conditions, subject to corporate tax (or assimilated) in its country of establishment, without the possibility of an option or of being exempt.[32]
– The CJEU was asked whether an investment company that is subject to tax at a zero rate,

28 5% * 33.99% = 1.6695%, rounded to 1.7%.

29 Before 1 January 2010, read EUR 1,200,000.

30 CJEU, 12 July 2012, Tate & Lyle Investments Ltd, C-384/11.

31 Art. 56 of the Act of 18 December 2015, Belgian Official Gazette of 28 December 2015, amended by art. 2 of the Act of 3 August 2016, Belgian Official Gazette of 11 August 2016.

32 Art. 106, §5, par. 3, c) RD/BITC requires that the foreign parent company does not benefit from a "tax regime deviating from the common tax regime".

provided that all of its profits are paid to its shareholders, should be considered to be liable to pay income tax in the meaning of the PSD.[33]

- According to the CJEU, this condition "does not merely require that a company should fall within the scope of the tax in question, but it also seeks to exclude situations that involve the possibility that, despite being subject to that tax, the company is not actually liable to pay that tax".[34] The CJEU further mentions that "the inclusion in national legislation of a provision whereby a specific category of companies may, in certain circumstances, be entitled to be taxed at a zero rate is tantamount to not subjecting those companies to that tax".
- It results from this interpretation that the foreign investment companies established in the EU (which, in general, do benefit from a tax regime that deviates from the common tax regime in such a way that they do not usually have to pay income tax) holding a 10 per cent-plus shareholding in Belgian companies will, in principle, not be able to benefit from the MWHT exemption on Belgian dividends. They will therefore incur the MWHT of 30 per cent (potentially reduced based on DTT[35]).
- However, this will not be the case for Belgian investment companies. As a matter of fact, in purely internal situations, the Belgian tax legislation does not set forth an effective taxation condition, so that "falling within the scope of" corporate tax is sufficient.[36]
- *Life insurance companies*. As mentioned above, the Tate & Lyle case led the Belgian legislator to reduce the MWHT rate applicable to foreign companies to 1.7 per cent, which makes it, in theory, equivalent to the ETR on dividends received by a Belgian resident company. However, it does not mean that the Belgian legislation is henceforth immune to any disputes under EU law. After all, the Belgian company will be able to deduct professional expenses from the residual tax base (namely the remaining 5 per cent), regardless of their (direct or indirect) link to the holding interest ("participation") having generated the dividends or to the collection of the dividends as such. For the foreign company, the MWHT of 1.7 per cent constitutes the final tax. EU case law is gradually evolving on the topic and we believe that the Belgian legislator may need to provide the possibility for foreign parent companies to deduct part of their professional expenses from the MWHT tax base.
- To summarise briefly this highly technical topic, at the current stage of EU case law, the question is not "whether" professional expenses should be deductible from the WHT tax base (the answer is "yes"), but rather "which" professional expenses should be deductible (e.g. for dividends: Expenses directly linked to the collection of the dividend? Expenses linked to the management of the holding interest that generated the dividend? Indirect/overhead costs? Is it necessary to make a distinction in that respect, depending on the fundamental freedoms at stake: freedom to provide services, on the one hand, freedom of establishment and free movement of capital, on the other? Etc.) and how that should be documented. The interested reader is invited to have a look at the Advocate General's opinion and the CJEU's judgment in the Brisal case.[37] Among others, it results from the opinion, that a double deduction of expenses (i.e. in the source state for the computation

33 CJEU, 8 March 2017, Wereldhave NV, C-448/15.

34 ibid, point 32.

35 Knowing that, for most of the DTTs concluded by Belgium, it is generally sufficient to be formally subject to an income taxation to be considered as tax resident of a Contracting State and therefore treaty-entitled.

36 Art. 106, § 6, RD/BITC.

37 CJEU, 3 July 2016, Brisal, C18/15.

of the WHT and in the residence state for the computation of the income tax) is fully justified if both states taxed the same income.

– The case of investments in Belgian shares made by foreign life insurance companies in the context of their unit-linked life insurance products deserves attention.
– In short, an insurance company collects premiums, these premiums are then invested in financial instruments, including shares (which constitute the "representative assets") in order to cover the financial commitments agreed on with the policyholders (which take the form of "technical provisions"). In order to meet their commitments, Belgian and foreign insurance companies therefore have the obligation to book technical provisions. In the specific case of unit-linked life insurance products, there is a matching between representative assets and technical provisions in the accounts of the insurer (in other words, for all income received on the representative assets, i.e. every profit, the insurance company books a technical provision, i.e. a cost).
– On the one hand, the technical provisions booked by Belgian insurance companies are, in principle, deductible professional expenses. On the other hand, foreign insurance companies (without a Belgian establishment) are not authorised to deduct any professional expenses in Belgium from the tax base formed by the Belgian dividends. Such taxation on a gross basis applies, despite the direct link that exists between the increase of the technical provisions and the Belgian dividends received on shares held as representative assets.
– Belgian insurance companies thus benefit from a zero tax base with respect to the dividends received (the MWHT is creditable and refundable), while foreign insurance companies incur the MWHT in full (potentially reduced based on DTT).
– It obviously constitutes a discrimination in the light of CJEU case law, particularly considering that *"it suffices to state that, in the national legislation at issue (…) the national legislation explicitly treats the amounts reserved/set aside with a view to meeting their obligations in respect of pension liabilities as 'expenses … incurred in order to acquire or maintain the income from economic activity'"* (that is to say, deductible expenses), so that *"it thereby creates a direct link between those amounts and the activity of the pension insurance bodies generating taxable income and itself makes them indissociable"*.[38]
– We encourage the legislator to proactively amend the Belgian legislation at the risk of otherwise enduring the cost of huge claims (which are currently piling up).
– *Standard corporates.* This "gross versus net" question is not only relevant for specific cases, but to some extent for all EU-based companies. We therefore call for a general rule allowing the deduction of appropriate expenses, even in the absence of a permanent establishment. More precisely, we would suggest that an option be provided to all EU companies now liable to MWHT to get these deductions in a so-called "notional" permanent establishment and that the deductible expenses be defined broadly (based on CJEU case law).
– *Belgian tax reform.* As already explained, an important tax reform is expected soon. Its main objective is to reduce the corporate tax rate to 25 per cent as from 2020. This lowering of the corporate tax rate might impact existing differences in treatment. It could even create new ones, especially if the standard MWHT rate remains at 30 per cent:
  – Strangely enough, if the standard MWHT rate remained unchanged, then Belgian

[38] CJEU, 8 November 2012, Commission against Finland, C-342/10, point 41.

regulated investment companies would be taxed more heavily on their Belgian-source dividends (30 per cent MWHT constituting the final tax) than Belgian companies subject to the standard corporate tax regime (25 per cent).
- In addition, foreign investment companies will probably claim they are comparable to Belgian companies that are subject to the standard corporate tax regime and try to obtain a refund of the difference (5 per cent).[39]

2.3 Procedural aspects of withholding tax in international settings

The procedural aspects of WHT in international settings are briefly described in part 3.

3. Part Three: Withholding tax on CIVs

- *General principles.* As mentioned above, a MWHT of 30 per cent is, in principle, applicable to Belgian-source dividends and interest payments made towards non-resident beneficiaries. Interest on bonds paid to non-resident savers (including foreign investment companies) are usually exempted from MWHT.
- In addition, Belgian-source interest payments on bonds are also exempted when they are paid to foreign contractual funds where their units are not publicly traded in Belgium and are not marketed in Belgium.[40]
- *Impact of DTTs.* As a result, DTTs are mostly relevant with respect to Belgian-source dividend income, especially because of the significant increase in the dividend MWHT rate over the years: from 15 per cent up to 2011 to 30 per cent as from 1 January 2017!
- In theory, Belgium can either provide for a relief at source (mostly applied in intra-group situations) or a refund method. In practice, the form 276 Div.-Aut. must be filled in by the beneficial owner who wishes to benefit from the DTT provisions.[41] The refund procedures are particularly burdensome (paper filing, need to request a certificate of residence to its own tax administration) and lengthy (about 18 months for the refund to be carried out).
- Belgium has not set in place any specific procedure for CIVs.
- *CIVs and treaty-entitlement.* The application of the DTTs assumes that CIVs are treaty-entitled. In that respect, the well-known issues spotted in the OECD study "The granting of treaty benefits with respect to the income of collective investment vehicles"[42] (2010) come into play.
- In a nutshell, Belgium entitles a CIV to the benefits of a DTT in its own right only if it is (i) a "person" that is (ii) a "resident of a Contracting State".
- In this respect, a CIV structured as a company clearly constitutes a "person" while a contractual fund does not.
- Belgium historically considers that a CIV is "liable to tax" and is therefore a "resident of a

39 Assuming no DTT reduction applies.

40 Art. 4, 8° of the Royal Decree of 14 June 1994.

41 Form: https://eservices.minfin.fgov.be/mym-api-rest/finform/pdf/2597; Explanations: https://eservices.minfin.fgov.be/mym-api-rest/finform/pdf/2572 (FR) and https://eservices.minfin.fgov.be/mym-api-rest/finform/pdf/2573 (NL).

42 The granting of treaty benefits with respect to the income of collective investment vehicles, adopted by the OECD committee on fiscal affairs on 23 April 2010, http://www.oecd.org/tax/treaties/45359261.pdf.

Contracting State", even if the state in which it is established does not in fact impose any tax on the CIV. The key element lies in the fact that the investment company is subject to income tax in the state in which it is established, even if the specific items of income it receives are exempt from taxation. This position is defended by Belgium with respect to the DTT entitlement of Belgian investment companies, such as Belgian SICAVs. On the other hand, a CIV that is transparent for tax purposes in the state in which it is established will not be treated as a resident of a contracting state because it is not liable to tax in that state, nor will a CIV that is totally and unconditionally exempt from income taxation.

– CIVs that are "persons" but which are not "liable to tax" are in principle excluded from the benefits of DTTs. Investors in such CIVs can also not apply the DTTs because they are not the legal owners of the underlying investments.
– Investors in contractual funds can, in theory, claim the DTT benefits, but the burden of proof on them is such that it does not offer a workable solution (except maybe in the case of non-widely held funds).

4. Part Four: Withholding tax in the digital economy

This last part aims to briefly address WHT issues (i.e. Belgium as a source state) with respect to the digital economy and, more precisely, within the framework of (i) the one-time download of computer software and other digital content (i.e. the simple supply of digitised goods or services, i.e. cases in which software or content in digitised format is delivered to taxpayers (business or end-consumer) through digital means) or (ii) cloud computing (i.e. the continual use (downloading, accessing, viewing, streaming, etc.) of computer software and other digital content).

In either case, the Belgian tax authorities will hardly be entitled to tax income derived by the suppliers of such digitised goods or services in the absence of a permanent establishment in Belgium in situations in which the income does not qualify as royalties for internal tax law and DTT purposes or the income does not qualify as service fees (and then only with respect to a limited number of DTTs or in the absence of a DTT). Even in the latter case, in which Belgium would be entitled to tax, the recent narrowing-down of the "catch-all clause" to intra-group transactions (see above) makes it inappropriate to cope with the issue on a large scale.

This topic has recently been dealt with by the European Commission in its recent communication on a "fair and efficient tax system in the European Union for the digital single market".[43] It will be important to monitor further developments at that level.

Finally, it is noteworthy that Belgium has recently addressed the case of the collaborative platform model. As mentioned in the first part, "miscellaneous income" includes (without being limited to) income from services rendered within the framework of the "collaborative economy". It comprises profits arising out of services (other than services which generate real-estate income, movable property income or miscellaneous income from a sublease or the transfer of a lease) rendered by an individual taxpayer to third parties, outside the exercise of a professional activity, whereby the following conditions are met simultaneously: (i) the services are only rendered to natural persons who do not act in the course of their

43 Communication from the Commission to the European Parliament and the Council, "A Fair and Efficient Tax System in the European Union for the Digital Single Market", Brussels, 21.9.2017, COM (2017) 547 final.

professional activity; (ii) the services are rendered solely in the context of agreements which have been concluded via an approved electronic platform; (iii) the service fees are only paid or allocated to the service provider by or via such a platform. The approved electronic platform can be based in Belgium or abroad (subject to conditions) and is required to levy a PrWHT of 10 per cent of the gross amount of the service fees.

This new form of miscellaneous income is a first step towards applying Belgian tax legislation to new ways of doing business. However, it remains confined essentially to purely internal situations since the service provider should have a national number and the PrWHT will only be levied if Belgium has the taxing power under the relevant DTT.