Belgium

Branch Reporter
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Summary and conclusions

Under Belgian domestic law, the attribution of income to a person is based on legal entitlement. This rule is absolutely clear with respect to income from real property. With respect to income from personal property, the attribution is generally also based on legal entitlement, but certain nuances may apply. Given the lack of specific attribution rules, uncertainties in the attribution – and transparency issues – indeed arise when the legal owner of the property is under an obligation to retrocede the income received to a third party. In this respect, practice shows that the legal owner may be disregarded for tax purposes (and a transparency regime can apply) in the case of certain intermediary structures, when the legal owner does not hold the assets for his own account, but for the account of a third party who has an immediate (pre-existing) right to claim that income from him, and when upon receipt of the income by the legal owner there is an immediate retrocession to the third party (or at least an immediate allocation of that income to the third party for tax purposes). On the other hand, the legal owner can normally not be disregarded purely on the basis of facts and circumstances, when there is no formal intermediary structure, as in the case of a typical back-to-back structure. Specific anti-conduit or anti-avoidance rules may apply in such a case to deny certain benefits which are considered undue, but the primary attribution of the income for tax purposes will then still be to the legal owner of the underlying asset. Some uncertainties in the attribution also arise when income is received by a person who is not (or no longer) the legal owner of the underlying asset.

Central for the attribution of income under double tax treaties is the concept of "beneficial ownership". This concept is not defined in Belgian law, or in treaties concluded by Belgium, and there is no case law providing any interpretation. However, Belgian doctrine tends to consider that the concept of "beneficial ownership" used for the application of treaties does not, if at all, substantially differ from the general principles for the attribution of income under Belgian domestic law.

The entitlement to tax credits is often closely related to the attribution issue. As a general rule, the person entitled to a tax credit for any tax withheld is indeed the same as the person to whom the relevant income is to be attributed for tax purposes. Entitlement to a tax credit is, however, often subject to specific restrictions and/or anti-avoidance rules under Belgian domestic law.

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The transfer of one's entitlement to income in such a way that the transferee becomes taxable on the income to the exclusion of the transferor is often difficult to achieve in Belgium. It is not that Belgian civil law imposes many restrictions in respect of the alienation of income, but the connecting rules for tax purposes are generally such that these transfers cannot be maintained against the tax authorities. Also the transfer of one's entitlement to passive income seems difficult to achieve if the income-producing asset is not transferred at the same time.

Belgium has not paid a great deal of attention to the potential issue of conflicts in the attribution of income between countries, and treaties concluded by Belgium generally do not contain any specific rule in this respect. Many of the considerations put forward in this report therefore result from a personal analysis of the author, and generally do not find any explicit support in case law, doctrine or even administrative practice; they are, however, drawn from the general principles found therein.

As a general rule, when imposing tax on domestic source income, Belgium attributes the income according to its own domestic law. It does not take into account the fact that the income may be attributed differently in the residence state of the selected taxpayer, or the fact that the law of another country may attribute the income to a different person. As a source country for the application of tax treaties, Belgium will generally disregard any conflicting attribution of the income in another country, and continue to apply its own attribution rule to determine who is entitled to claim treaty benefits. There may, however, be certain exceptions.

When it is the residence state, Belgium normally attributes foreign source income according to its own rules, without paying attention to the attribution made in the source country or under the law of a third country. A conflicting attribution in the source country or under the law of a third country will generally not prevent the Belgian taxpayer, to which foreign source income is attributed under the Belgian rules, from benefiting from double taxation relief with respect to that income.

1. General principles

1.1. Taxable person

1.1.1. Domestic law

Under Belgian domestic law, the attribution of income to a person is, as a general rule, based on legal entitlement. Hence, in order to determine who is taxable with respect to certain income, one needs to examine who is the legal owner of – or the holder of a "right *in rem*" on – the asset generating such income.[1]

[1] "Rights *in rem*" can be defined to include legal ownership as well as all rights resulting from the split of the legal ownership of an asset (a usufruct right for instance). For the purpose of this analysis, "legal owner" or "legal ownership" will be deemed to refer to the holder of the full

This rule is absolutely clear with respect to income from real property (immovable assets). Belgian domestic law indeed explicitly provides that income from real property is taxable in the hands of the legal owner of such property or, as the case may be, in the hands of its holder (*possesseur*) or of the holder of a long-lease right (*emphythéote*), the holder of a building right (*superficiaire*) or the holder of a usufruct right (*usufruitier*) on such property.[2]

With respect to personal property (movable assets), although the attribution of income is, as a general rule, also based on legal ownership, certain nuances may apply.[3] Quite surprisingly, Belgian domestic law does indeed not explicitly provide to whom income from personal property is to be attributed for tax purposes.[4] This creates uncertainty when income from such property is received by a person who is under an obligation to retrocede that income to a third party, or when such income is received by a person who is not (or no longer) the legal owner of the underlying asset.

The general definition of "income from movable assets" contains one important criterion – the requirement of a "use of capital" – that is generally very helpful for identifying the person to whom such income should be attributed for tax purposes. A person who did not make any "use of capital" in relation to the source of income can generally not be considered to be the taxpayer with respect to that income. On the other hand, as the "use of capital" generally implies that the one who has it acquires ownership rights, income from personal property is generally taxable in the hands of the person holding ownership rights on the source of income (and who as a holder of such rights can claim payment of the income). The fact that such person may be held, under a separate agreement, to retrocede the income to a third party is generally irrelevant for the attribution issue (see examples under section 1.3). Exceptions can, however, be found in the context of certain intermediary structures, where the legal owner has the use of capital for the account of a third party, instead of for its own account (see section 2.3).

That the person to whom income can be attributed for tax purposes need not necessarily be the legal owner of – or the holder of a usufruct right on – the underlying asset has already been confirmed on one occasion by the Belgian Supreme Court.[5] The difficulty is, however, to see in which specific situations that case law can apply in practice.

cont.
ownership rights on the underlying asset, or to the holder of the relevant split ownership right, as the case may be.

2 Art. 11 of the Belgian Income Tax Code (ITC). This allocation rule applies both in inbound and in outbound situations (Com. IR, 11/1).

3 For a detailed and thorough analysis of the general rule and its nuances, see P. Smet, *Handboek Roerende Voorheffing*, Kalmthout, Biblo, 2003, pp. 34–55.

4 Except in certain instances where reference is made to the "holder" of the underlying asset (art. 19 §2, line 2 ITC) or the "beneficiary" of the income (art. 267 ITC). Interestingly, the Law of 17 May 2004 which transposes the Savings Directive into Belgian law contains, in its art. 3 §1, 5°, a presumption (which can be rebutted) according to which "any individual receiving the payment of interest or to whom the payment of interest is being attributed is to be considered as the beneficial owner thereof, unless he can prove that the interest was not paid or attributed to him for his own account".

5 Cass. 7 May 1996, *Arr. Cass.*, 1996, 410. For a further analysis of the exact scope of that decision, see Smet, *op. cit.*, pp. 43–46.

Is there a clear dividing line between cases where income is (contrary to the general rule) not to be attributed to the legal owner of the underlying asset, but directly to a third party (the ultimate beneficiary of that income), and cases where income must still be attributed to the legal owner despite its retrocession to a third party? As we will see below (mainly in section 2.3), the answer to this question is today still a little unclear. Practice tends to show that the legal owner can possibly be disregarded (and the income attributed directly to a third party) only in situations where the legal owner does not hold the asset for his own account, but rather for the account of a third party who has an immediate (pre-existing) right to claim that income from him, and where upon receipt of the income by the legal owner there is an immediate retrocession to the third party (or at least an immediate allocation of that income to the third party for tax purposes). On the other hand, the legal owner can, generally speaking, not be disregarded purely on the basis of facts and circumstances, when there is no formal intermediary structure (as in the case of classical conduits and back-to-back structures). It may be that specific anti-conduit or anti-avoidance rules apply in such a case to deny certain benefits that are considered to be undue (see section 2.4), but the primary attribution of the income for tax purposes will then still be to the legal owner of the income-generating asset.

1.1.2. Treaties

Central for the attribution of income under double tax treaties is the concept of "beneficial ownership". Treaties concluded by Belgium often do not contain any specific attribution rule, other than the reference to the beneficial ownership requirement.[6]

As the concept of "beneficial ownership" is usually not defined in the Belgian treaties, its exact scope normally needs, according to the majority of Belgian doctrine, to be determined by reference to the domestic law of the country applying the treaty.

There is no reported case law in Belgium that includes an interpretation of the "beneficial ownership" concept. The Belgian tax authorities adhere to a strict legal approach. In their administrative commentary on double tax treaties, they indeed refer to the legal owner or usufruct holder of the underlying assets to define the beneficial owner of income from such assets.[7] Since this administrative commentary has not been recently updated, one would not expect it to include the latest trends (if any). Interestingly, however, the Belgian Minister of Finance has recently confirmed that a strict legal approach prevails.[8]

The Belgian doctrine also considers that the concept of beneficial ownership for the application of tax treaties needs to be construed on the basis of a legal

6 An exception is art. 3.2 of the treaty with New Zealand which provides that trustees are to be regarded as the beneficial owner of passive income if they are subject to tax in New Zealand in respect of that income. Interesting is also art.1(6) of the new treaty with the United States which deals with income derived through fiscally transparent entities.

7 Com.Gen.Conv., 10/204; 11/204 and 12/203.

8 Parl. Vr. no. 802 of Mr Devlies of 28 March 2006, *Beknopt Verslag*, Kamercommissie voor Financiën, no. COM 906 of 28 March 2006, 8. See also L. de Broe, *Fiscoloog Internationaal*, no. 272/273, 5.

analysis, rather than on the basis of any form of economic analysis. While a number of authors strictly refer to the legal entitlement to the underlying assets, as in the administrative commentary, others include some other criteria or restrictions in their analysis, such as the fact that the beneficial owner must have the freedom to dispose of the income, or the fact that, in order to be seen as such, he cannot be under a contractual obligation to retrocede that income to another person.[9] But, generally speaking, Belgian authors tend to consider that the concept of "beneficial ownership" used for the application of treaties does not, if at all, substantially differ from the general principles for the attribution of income under Belgian domestic law.[10]

Interestingly, some authors consider that the Belgian interpretation is not substantially different from the "common-law" interpretation of "beneficial ownership" either: in both cases, it is essential to have a legal right with respect to the income at stake (a pure economic analysis is thus excluded); it is not always necessary that this right be a "right *in rem*" *vis-à-vis* the source of income (although in practice it will often be the case); and finally, the analysis to determine who has "beneficial ownership" is purely legal, meaning that factual behaviour (e.g. an independent decision by a beneficiary to retrocede his income) is normally not relevant for that analysis; only a legal obligation to retrocede income can be of importance.[11] However, there are probably still some differences. Indeed, unlike the economic approach that seems to be used in some US rulings and case law in the case of typical back-to-back structures, the general tendency in Belgium is to consider that this kind of structure cannot be defeated under the Belgian interpretation of the concept of "beneficial ownership", but possibly only in application of the sham theory or of the general anti-abuse provision.[12]

Finally, it is important to stress that when the formal recipient of the income and the "beneficial owner" thereof are two different persons, but both are established in the same treaty country, it is generally accepted that the benefits of that treaty must be granted. When the formal recipient of the income and the "beneficial owner" thereof are established in different countries, the benefits of the treaty with the country of the "beneficial owner" should apply.[13]

9 For an overview of the different positions, see Smet, *op. cit.*, pp. 399–401.

10 With respect to his analysis of fixed interest trusts, one author, however, considers that, while the trustee should be seen as the beneficiary of the income for Belgian tax purposes, he cannot be considered to be the "beneficial owner" under the treaties (which he can therefore not invoke), because the concept of "beneficial ownership" under treaties requires a capacity to dispose of the income. See R. Deblauwe, "Trusts en gelijkaardige rechtsfiguren: hun mogelijkheden, gevaren en fiscale gevolgen", in *Is er nog leven na de Luxemburgse holding?*, Kalmthout, Biblo, 1995, pp. 53–55. We would tend to believe that the capacity to dispose of the income is also essential for the attribution under Belgian domestic law, and that absence thereof will in most cases also lead to an attribution of the income to the ultimate beneficiary for domestic tax purposes.

11 See Smet, *op. cit.*, p. 412.

12 J. Muyldermans, K. de Haen and K. Hostyn, "Het begrip 'uiteindelijk gerechtigde' naar (Belgisch) fiscaal recht: juridische invulling houdt stand", AFT, 2002, 353 (361).

13 See OECD commentary 2003, no. 10/12.2, which countries are, according to the Belgian tax authorities, expected to endorse unless they have made specific observations (cf. Administrative Circular AAF 5/2004 of 16 January 2004 on the application of double tax treaties, p. 11). See also Smet, *op. cit.*, p. 397.

1.2. Tax credit

As a general rule under Belgian tax law, the person entitled to a tax credit for any tax withheld is the same as the person to whom the relevant income is to be attributed for tax purposes. This principle applies both in purely domestic situations and in cross-border situations.

The link with the rules for the attribution of income renders the latter particularly important in certain situations where, despite the legal entitlement of a person to certain income, the tax authorities consider that this income is earned for the account of another person. As an example, the tax authorities tend to refuse the imputation of any withholding tax levied in respect of income earned by insurance companies from investments realized in the context of their so-called "branch 23" (i.e. unit-linked insurance) activities, a position which is heavily criticized in the doctrine.[14] The Belgian Supreme Court ruled that an entity collecting a dividend (to which it was legally entitled) for the account of someone else could not be considered to be the recipient of that dividend for tax purposes and was therefore not entitled to credit the tax withheld.[15]

Entitlement to a tax credit is often also subject to some specific restrictions. For instance, in the case of dividends from shares that are allocated to a professional activity (i.e. shares held by a so-called "professional investor"), the imputation of any tax withheld is only permissible if the professional investor is a full owner of the shares at the time of attribution or payment of the dividend.[16] With respect to interest income, the imputation of any tax withheld is restricted to the portion of such tax relating to the period during which the taxpayer has had the full ownership or usufruct of the underlying asset.[17]

Belgian domestic law also grants a credit for foreign withholding tax levied on interest and royalties (not on dividends). This credit requires that the income-generating assets be allocated to a professional activity in Belgium, a condition which the Belgian tax authorities often consider not to be fulfilled in the case of coupon-stripping schemes designed to unduly benefit from the credit.[18] Foreign tax credits are also subject to some specific restrictions.[19] However, these domestic rules limiting the amount of the credit often do not apply when Belgium has concluded a double tax treaty with the country of source according to which it must grant such credit under less stringent conditions.[20]

14 See M. Eloy, "La fiscalité de la branche 23", RGF, 232 (242–243). See also Smet, *op. cit.*, p. 43.

15 Cass., 27 September 1991, AFT, 1992, 222. This decision reversed an earlier decision of the Court of Appeal of Brussels: Brussels, 13 March 1990, AFT, 1990/10, 278, note S. Geubels. See also Deblauwe, *op. cit.*, pp. 47–48.

16 Art. 281 ITC. Hence, a professional investor holding the shares in usufruct only is not entitled to credit the tax withheld (and such credit is therefore lost).

17 Art. 280 ITC. Note that, for professional investors, a usufruct right on the underlying asset does not suffice to be entitled to credit the (relevant portion of the) tax withheld, full ownership is required.

18 Smet, *op. cit.*, p. 450.

19 See arts. 287–289 ITC. In particular, with respect to interest income from a foreign source, only the portion of the foreign tax credit that relates to the actual income attributable to the Belgian taxpayer is creditable (which income is to be determined in proportion to the period during which he has had the full ownership of the underlying asset).

20 For an overview of the different types of treaty rules overruling the limitations under Belgian domestic law, see Smet, *op. cit.*, pp. 459–462.

1.3. Alienation of income

Belgian courts have often been confronted with the question whether entitlement to income can be transferred in such a way that the transferee becomes the taxable person to the exclusion of the transferor.

Well-known is the famous case where a member of a religious order (*Soeur Sourire*) had decided to retrocede all her author's rights and royalty income (she was a successful singer) to her Congregation, and claimed not to be taxable on that income. Despite this retrocession, the Court of Brussels considered that she was taxable on the income, notwithstanding the fact that it had been paid directly (from the source) to the Congregation. In order to come to that conclusion, the Court investigated, based on the underlying contractual documentation and the facts of the case, whether the income had been acquired directly by the Congregation (in which case Soeur Sourire could be considered never to have been (legally) entitled to it) or whether such income had entered into her estate to be subsequently transferred to the Congregation. It concluded the latter.[21] A similar conclusion was reached in a number of cases where doctors had decided to retrocede their fees to not-for-profit organizations (ASBL) established to streamline their activities and joint investments.[22] In another case where the shareholder of a company had transferred a portion of his dividend entitlements to an employee of that company, it was decided that the employee was not entitled to credit the withholding tax levied on that dividend, because he had no legal title to the underlying shares.[23] Finally, there is also the case of retrocession of directors' fees (i.e. payments received by a person in his capacity as member of the board of directors of a company). Although the basic rule remains that the director is taxable on that income, despite any (partial or full) retrocession thereof (generally to the entity which the director is supposed to represent on the board), administrative practice allows, under certain conditions, that this income is exempt from wage withholding tax.[24]

All these examples show that it is extremely difficult, under Belgian law, to transfer one's entitlement to income in a way that the transferee becomes taxable on such income to the exclusion of the transferor. It is not that Belgian civil law imposes many restrictions in respect of the alienation of income,[25] but the connecting rules for tax purposes are generally such that the transfer of one's entitlement to income cannot be opposed against the tax authorities. As an example, employment income is defined for tax purposes as all income that constitutes, for the employee, the compensation for his work in the service

21 Brussels, 29 June 1982, FJF, 82/111. For an analysis of this case, see Deblauwe, *op. cit.*, p. 46.

22 In this context, they believed they were taxable only on the amount of income actually received from the ASBL, but the courts did not follow their reasoning. See in particular Mons, 29 June 2001, FJF, 2002/7.

23 Brussels, 8 March 2000, *Fiscoloog*, 758, 10.

24 This avoids a pre-financing disadvantage for the director. See QP no. 133 of 25 November 1999, Pieters, *Q&R*, Chambre, no. 29, 8 May 2000, 3434. See also J. Baeten, *Act. Fisc.*, 22, 7 June 2000, 1.

25 Most types of income can indeed be alienated. Some restrictions are imposed on the amount of salary (or other active income) that can be alienated (arts. 1409 *et seq*. Judicial Code), but the existence of these restrictions implies that the alienation of salary is as such not forbidden.

of an employer. With such a definition, it seems that only the employee himself can be taxable on the income received from his employment (even if part of that income is transferred to someone else, and even if that someone else has a direct right to receive it from the employer).[26] Also the transfer of one's entitlement to passive income seems extremely difficult to achieve (in such a way that the transferee be recognized as the taxpayer with respect to that income), if the income-producing asset is not transferred at the same time (see section 2.2).

2. Specific attribution issues

2.1. Deemed attribution rules

Income received by an entity legally entitled to it can sometimes be attributed to another person for tax purposes and be subject to tax in the hands of that other person, either because the entity is treated as a transparent entity for tax purposes or because a specific deemed attribution rule applies.

2.1.1. Transparent entities

Typical examples of transparent entities for Belgian tax purposes are the economic interest grouping (EIG) and the European economic interest grouping (EEIG). Despite the fact that these entities have a legal personality under Belgian law that is separate from that of their members, they are deemed to have no legal personality for Belgian tax purposes. As a result, profits (or losses) of such entities are taxable (or attributed) directly in the hands of their members. Also the entitlement to tax credits (both domestic and foreign) is transferred to the members. Possible relief from withholding tax on income received by such entities, however, only applies if all their members qualify for such relief.[27] The transparency regime applies both if the members are Belgian residents and if they are not. Foreign members are deemed to have a Belgian establishment (BE) and to receive their share of the profit through that BE.[28] Because these entities are not taxable as such under Belgian law, they do not qualify for treaty benefits. Only the members can, as the case may be, claim such benefits.[29] Interestingly, a non-Belgian EEIG that has separate legal personality under the domestic law of its country of residence will also be treated as transparent for Belgian tax purposes,

26 This allocation probably also results from the fact that, under civil law, rights and obligations arising under "synallagmatic agreements" (i.e. agreements which entail reciprocal rights and obligations) can often not be transferred as such: see H. de Page, *Traité élémentaire de droit civil belge*, Tome III: *Les obligations*, no. 388, p. 377.

27 Circ. no. Ci.RH.421/439.272 of 17 September 1989, *Bull. Bel.*, 732, no. 47, 3068.

28 Art. 229 §3 ITC. However, the question whether that BE also constitutes a PE of the foreign member under the relevant treaty needs to be appreciated on a case-by-case basis: see Circ. no. Ci.RH.421/439.272, *op. cit.*, no. 44, 3066.

29 Com.Gen.Conv., 3/27.

and a Belgian member of such an entity will be taxable in Belgium on its share of the profit, unless this profit is allocated to a foreign permanent establishment under the relevant treaty.

This raises the question how Belgium deals with foreign transparent entities, i.e. entities which, despite their legal personality, are treated as transparent under the domestic tax law of their country of residence. Does Belgium attribute income (from a Belgian or foreign source) received by such entities to these entities as such (because of their legal personality and their capacity to receive income) or directly to their members or shareholders (in accordance with the transparency treatment applicable in their country of residence)? This question was addressed in a number of recent rulings regarding the Belgian tax treatment applicable to income received by and through UK limited liability partnerships (LLPs). First of all, the Belgian Ruling Commission confirmed that, because they have legal personality under UK law, LLPs are, pursuant to Belgian domestic law, taxable as such on their income from a Belgian source (irrespective of the transparency regime applicable in their country of residence). However, as a next step, the Commission analysed the (international) tax treatment applicable to profit attributions to the partners, taking into account the allocation of the right to tax under double tax treaties. Given the predominance of double tax treaties over domestic law, it then came to the conclusion that foreign source income attributed to the Belgian partners of an LLP was to be exempt in Belgium (and thus not to be treated as taxable dividend income in their hands),[30] but also (and perhaps more surprisingly) that the share of the Belgian partners in the profit of the Belgian establishment of the LLP was to be taxed directly in their hands (and thus not in the hands of the LLP as for non-resident partners).[31]

2.1.2. Other deemed attribution rules

A typical example is the domestic rule according to which income related to the performance of an artist or a sportsman in Belgium is taxable in this country, even if it is paid to another (individual or legal) person that is legally entitled to it and has no presence in Belgium.[32] If the other person is established in a treaty country, the domestic rule will only apply if the treaty with that country contains a provision similar to article 17(2) of the OECD model treaty (which is generally the case for the more recent tax treaties). In the absence of such a treaty provision, Belgium cannot tax this income, except to the extent that (part of) it is paid back to the artist or sportsman as a salary or in any other form.[33]

[30] This position in any case comes down to allocating directly to the Belgian partners, for the application of double tax treaties, their share of the income realized by the LLC (which is otherwise treated as a separate legal subject for Belgian tax purposes).

[31] For comments on these decisions, see Ph. Hinnekens, *Fiscologue International*, 264, 1 (4–5); A. Bax, "De Belgische belastingheffing van buitenlandse partnerships: een imbroglio", TRV, 2006; 3 (36–40).

[32] Art. 228 §2, 8° ITC. Here the attribution is based on the personal exercise of the activity, rather than on who is legally entitled to the income from that activity.

[33] In which case only the margin realized by the interposed entity is exempt from taxation in Belgium. See E. Schoonvliet, *Handboek Internationaal Fiscaal Recht*, Kalmthout, Biblo, 1996, pp. 165–167.

2.2. Income from assets

Under Belgian domestic law, special issues can arise from the fact that the receipt of income is changed as a result of a change of ownership of the underlying asset. These issues often boil down to the question of who, given those changing circumstances, is the taxpayer for the determination of the applicable withholding tax and who (if anyone) can credit the amount of such withholding tax.

2.2.1. Dividends

Entitlement to a dividend does not accrue over time, but is created when the dividend is declared. As a result, any dividend declared after shares have been sold with the relevant coupon can only be attributed to the buyer for Belgian tax purposes, and any income realized by the seller in respect of the prior transfer is to be treated as a capital gain in his hands. The attribution of income will also be to the buyer when shares are being sold with the relevant coupon after the dividend has been declared, but before the actual "attribution" or payment date (which can both be different from the date of declaration of the dividend). This is because for Belgian tax purposes the taxable moment is the moment of "attribution" or payment of the dividend. When shares are sold with the relevant coupon after the dividend has been declared and "attributed" (if the attribution date is different from the declaration date), but before it is effectively collected, the dividend will at this time be attributed to the seller for Belgian tax purposes.

The question can be raised whether a dividend can be attributed for tax purposes to a person who buys coupons without the relevant shares (or sells shares without the coupons) before the dividend is declared or attributed. In a number of cases dealing with the question whether the holder of coupons (without the shares) could benefit from a tax credit, a majority of the courts ruled negatively. According to the courts, the holder of coupons can neither be considered to be a shareholder nor to have made any "use of capital", so that the income received cannot be considered as income from "movable assets" in his hands. It is unclear whether in such a case the income can instead be attributed to the legal owner of the shares for tax purposes, allowing him to benefit from the tax credit.[34] It is also questionable whether this case law prevents the attribution of income to the coupon holder for determining the applicable withholding tax rate under double tax treaties.[35]

Under Belgian tax law, dividend-stripping structures designed to unduly benefit from a lower rate of withholding tax or from a credit for such withholding tax are often defeated through various types of provision which consist in either making a withholding tax exemption dependent on a minimum period of owner-

34 Smet, *op. cit.*, pp. 52–55.

35 See F. Dierckx, "Artikel 10 – Dividenden", *Het nieuwe Belgisch-Nederlands dubbelbelastingverdrag*, Brussels, Larcier, 2001, p. 175 (193 and 195) who considers that, for the application of possible treaty reductions, the ownership of the underlying shares can, contrary to the position of the Belgian tax authorities in their commentary (Com.Conv. 10/204), not be seen as a requirement. A legal entitlement to the dividend itself (dating back before the attribution of such dividend) should suffice. On the contrary, ownership of the shares is often a requirement for domestic exemptions (or reductions) of withholding tax.

ship[36] or refusing the imputation of withholding tax in specific situations.[37] Structures designed to unduly benefit from the participation exemption are defeated by the fact that a one-year minimum period of ownership is required for the benefit of that exemption, which is to be appreciated on a share-by-share basis.

2.2.2. Income accruing over time

Belgian tax law generally departs from the civil law approach according to which certain types of movable income (such as for instance income from securities) accrue over time. The entire amount of such income is generally attributed for Belgian tax purposes to the person who is legally entitled to it at the moment of attribution or payment.[38]

A specific exception applies with respect to income from fixed interest securities, which is attributed to each successive holder of the securities in proportion to his holding period. Any tax withheld is creditable in the same proportion. When a transaction occurs between two payment dates, the income realized on that transaction has to be split up between a part corresponding to the pro rata interest component and another part corresponding to the actual capital gain or loss on this transaction. Professional investors established in Belgium are taxable on the entire amount of income (both interest component and capital gain) at the time of its realization, and are able to credit the pro rata amount of (Belgian or foreign) withholding tax possibly even before it is actually withheld.[39] Non-professional investors (and foreign investors not established in Belgium) are in principle taxable on their pro rata share of interest (and usually not on the capital gain component) only at the time of attribution or payment.[40]

Under Belgian domestic law, coupon-stripping structures designed to unduly benefit from an exemption (or reduction) of withholding tax are often defeated by the condition that is typically imposed for exemptions of withholding tax on interest from fixed income securities, that the holder of the instrument must have held it during the entire period of interest. On the other hand, treaty exemptions (or reductions) of withholding tax which apply with respect to income from fixed

36 As an example, a minimum holding period of 12 months is required for the benefit of the exemption under the Parent–Subsidiary Directive.

37 Such as the situation where the dividend payment leads to a write-off on the shares (art. 282 ITC) or the situation where the underlying income has not been taken into account for the determination of the taxable basis of the entity claiming the imputation of the withholding tax (art. 123 RD/ITC).

38 Professional investors holding securities are, however, usually obliged to book the income accruing on such securities already before the attribution or payment date, and they are taxable on such income (see art. 362bis ITC). In this context, the aforesaid attribution rule only matters for the application of the relevant withholding tax and of the rules regarding tax credit. See Smet, *op. cit.*, pp. 50–51.

39 Com.IR, 185/29 and 276/24. However, they need to be able to provide evidence that the tax was eventually withheld.

40 The withholding tax, which is often a final tax for them, is indeed only levied at that time. In practice, the pro rata amount of withholding tax eventually due is often taken into account to calculate the price that a non-professional seller will receive for securities when these are sold between two payment dates.

interest securities often do not require a minimum holding period. The only condition imposed by treaties is generally that the person collecting the interest be the beneficial owner thereof, a capacity which can in principle not be construed as being limited in proportion to his holding period.[41]

2.3. Intermediaries

As indicated in section 1.1.1 of this report, income received by a person legally entitled to such income can sometimes be attributed to a different person for Belgian tax purposes (and be subject to tax in the hands of that other person) when the legal owner is a mere intermediary who is holding the income-producing asset for the account of the other person (ultimate beneficiary). The difficulty is to determine when this transparency regime applies, and when it does not.[42]

In practice, an immediate retrocession of the income to the ultimate beneficiary,[43] combined with a (pre-existing) right for the ultimate beneficiary to immediately claim that income,[44] are the most essential criteria that lead to transparency. However, other factors can possibly play a role as well.[45]

2.3.1. Agents

With respect to agency structures, an important distinction needs to be made between agents and commissionaires (also called "undisclosed agents" in common law countries). An agent usually acts both in the name and for the account of a third party. As such, he is not legally entitled to the income resulting from the transaction he is entering into, and the income will therefore not be allocated to him for tax purposes.

The situation of the commissionaire, who acts in his own name, but for the account of a third party (which is not necessarily "disclosed" to the outside world), is different. An example is the case of a sales commissionaire. In Belgium, such commissionaire is taxable only on the amount of his commission, not on the sales proceeds realized through his intervention. This treatment also finds support in the accounting treatment applicable to such transaction.[46]

41 See Smet, *op. cit.*, p. 185.

42 To date, the Belgian tax authorities have not issued any clear guidelines in this respect and the experience (and current practice) shows that very similar situations sometimes lead to different approaches by the tax authorities, without a clear dividing line being currently identifiable.

43 Or, at least, the immediate attribution of the income to the ultimate beneficiary for tax purposes (see in this respect Decision no. 400,358 of 16 February 2006 of the Belgian Ruling Commission).

44 As a result of which the intermediary has no freedom to dispose of that income.

45 Like the question of whether the legal owner can possibly suffer a personal loss or realize a personal gain in relation to the underlying investment, the question of whether the income is accounted for in the books of the legal owner (or rather "off balance sheet"), or the question of whether the income (if any) earned by the legal owner is in some way related to the amount of income received from the underlying investment. Also the question of whether the legal owner can freely acquire and/or dispose of the underlying asset could have some importance. The type of intermediary structure used (trust arrangement, fiduciary relationship or investment fund) should not, in itself, have any decisive impact.

46 The Belgian Commission for Bookkeeping Standards has indeed issued advice confirming that a commissionaire (acting for the account of a third party) only needs to take the commission

2.3.2. Trusts

Belgium, being a civil law country, does not have the concept of trust,[47] and therefore attribution issues relating to trusts will only arise in relation to foreign trust arrangements. Since there are many different kinds of trust, the Belgian analysis will always depend on a careful analysis of the trust deed. If the beneficiary has absolutely no right to receive any of the income from the assets in trust, but the trustee can at its discretion decide which beneficiaries should receive a distribution (the case of a discretionary trust), income from the assets will be attributed to the trustee, who will be the relevant person for determining the applicable rate of withholding tax or to claim treaty benefits in relation to that income. If the beneficiary of the trust has an immediate right to receive the income from (certain or all of) the assets in trust, a direct attribution of that income to the beneficiary is likely to apply (full transparency). The situation becomes more complicated when the beneficiary is entitled to receive a specified amount of income from the trust, but the trustee is simply required to pay that amount out of the total income earned from the trust assets. A majority of authors consider that, in such a case, an "unperfected form of tax transparency" applies: income from the trust assets should be attributed to the trustee (who is the relevant person to determine the applicable rate of withholding tax or to claim treaty benefits), and the beneficiary should only be taxable on the actual amount of income received from the trustee.[48]

2.3.3. Other intermediary structures

Many other forms of intermediary structure exist under Belgian law. An interesting example is the mechanism of certification of shares, under which an entity issues certificates in exchange for shares of which it acquires the legal ownership with the commitment to retrocede the income thereof to the holder of the certificates. In this respect, the Law of 15 July 1998 provides that, although the intermediary entity issuing the certificates is the legal owner of the shares, it is the holder of the certificates who is to be considered as the shareholder and direct beneficiary of the income from the shares.[49] As a result, in determining the applicable withholding tax rate, one has to take into account the identity (and all attributes) of the certificate holders. They are also the ones entitled to a credit for any tax withheld. As this transparency regime is also considered to apply for treaty purposes, non-resident certificate holders established in a treaty country

cont.

received into his turnover (and not the proceeds from the sales concluded for the account of his principal). See Advice CBN no. 103/1, *Bull. CBN*, 1977, no.1, 12–14.

47 Relevant characteristics for a foreign trust to be recognized under Belgian law have been introduced in the (relatively new) Belgian Codex regarding conflicts of law (so-called "IPR Codex"). However, a trust cannot act before a Belgian Court, unless the identity of the trustees is disclosed (Trib. Brussels, 24 February 2006, *Fiscologue* no. 1051.7).

48 See among others A. Haelterman, *Fiscale transparantie*, pp. 321 (*et seq.*). For Deblauwe, the same applies, but the trustee is not entitled to claim treaty benefits: see Deblauwe, *op. cit.*, p. 55.

49 An essential condition for the application of this transparency regime is that the issuer of the certificates immediately pays all income or proceeds from the shares to the holder of the certificates.

can claim treaty benefits, as if they were shareholders of the distributing company. Importantly, if both the issuer and the holder of the certificates are non-residents, and if they are established in two different (treaty) countries, it is the treaty with the country of the certificate holder that is applicable.[50]

2.4. Anti-avoidance law

Belgium only has limited anti-avoidance provisions to deal with structures involving a diversion of income to a different person in order to benefit from a more favourable tax regime in terms of withholding tax or of credit for tax withheld.

2.4.1. Conduits

Unlike the situation in other countries, there are no general anti-conduit regulations in Belgium. One specific anti-conduit rule, however, applies in relation to the domestic exemption of withholding tax for dividends paid to foreign pension funds (and other foreign tax-exempt not-for-profit organizations). According to this rule, the exemption is not applicable when these foreign pension funds (or other foreign tax-exempt organizations), although they are acting in their own name, are under a contractual obligation to retrocede the income received to an ultimate beneficiary, unless the ultimate beneficiary were also to qualify for the exemption.

In the absence of general anti-conduit regulations, and as double tax treaties concluded by Belgium generally do not contain any specific anti-conduit rule, much thus depends on the interpretation of the "beneficial ownership" concept, which, as indicated above (see section 1.2), is very much based on a strict legal analysis in Belgium.

2.4.2. Controlled foreign company/passive foreign investment fund/foreign trust regimes

Belgium also does not have any legislation to deal with the diversion of income by Belgian residents to controlled foreign companies (CFCs), passive foreign investment funds (PFIFs) or foreign trusts.

2.4.3. Other domestic anti-avoidance measures

However, there is one specific anti-avoidance rule which typically works as a kind of "transfer of assets abroad regime". Under that rule, if a Belgian resident taxpayer transfers an income-producing asset abroad (to a foreign taxpayer which is not subject to tax or benefits with respect to the income produced by that asset from a tax regime which is notably more advantageous than

50 D. Garabedian, "Administratiekantoor de droit belge: incidences en matière d'impôts sur les revenus belges", in *Skyroom Events Journée d'étude du 18 novembre 1998*, no. 11, p. 8 and no. 16, p. 11.

the Belgian tax regime applicable thereto), he will, except if certain exceptions apply, continue to be taxed on income from that asset as if the transfer had not taken place.

The Belgian tax authorities sometimes also try to apply the general anti-avoidance provision (which embodies the so-called "step-transaction doctrine") to counter schemes of (what they perceive to be an) artificial diversion of income through for instance the interposition of a foreign company or the splitting-up of a transaction into two separate transactions (e.g. lease/sublease). However, the limited case law available on this issue tends to indicate that such challenges are often unlikely to be successful in practice because the transactions, as tentatively recharacterized by the Belgian tax authorities, cannot be reconciled with the existing legal relationships and consequences of the actual transactions.[51]

Finally, the Belgian tax authorities sometimes successfully invoke the sham theory to disregard the interposition of a foreign company that operates as a mere conduit. However, the specific circumstances of the case generally need to be quite extreme for such a challenge to be successful.[52]

2.4.4. Treaties

No specific measures to prevent manipulation of the entitlement to income for treaty purposes can be found in either Belgian domestic law or in double tax treaties to which Belgium is a party. There is no reported case law on that subject matter either.

3. Conflicts in the attribution of income

Conflicts in the attribution of income can arise because countries apply different principles to such attribution. One country can for instance focus on legal entitlement while the other focuses on economic entitlement. One country can treat an entity as a transparent entity for tax purposes while another country does not. Obviously, there are many more examples.

Generally speaking, Belgium has not paid a great deal of attention to this potential issue, and many of the considerations drawn hereafter therefore result from a personal analysis of the author, generally without any explicit support in case law, doctrine or even administrative practice; but they are, however, drawn from the general principles found therein.

51 Recharacterization was accepted in some specific lease/sub-lease scenarios: see Cass., 21 April 2005, FJF, 2006/1, 60 and Liège, 24 November 2006, *Fiscalnet*, 11 January 2007. In other cases recharacterization was denied: see Trib. Leuven, 23 December 2005, *Fisc. Act.*, 2006/4, 1; *Cour. Fisc.*, 2006, 531: Trib. Brussels, 1 September 2006, *Fiscologue*, no. 1052, 19.

52 Cass., 19 October 1965, *Pas.*, I, 231 referred to in Deblauwe, *op. cit.*, p. 43. See also Trib. Namur, 27 March 2002, *Fiscologue*, 843, 8. This decision was partially reversed by Liège, 12 March 2004, FJF, 2005, 125, 461.

3.1. Source country taxation

From the perspective of the source country, the attribution of income is important, first of all, to determine the applicable tax regime and/or rate of withholding tax, and secondly to determine which person (if any) can claim treaty benefits leading to a reduction of taxation.

3.1.1. Domestic law

As a general rule, when imposing tax on domestic source income, Belgium attributes the income according to its own domestic law. It does not take into account the fact that the income may be attributed differently in the residence state of the selected taxpayer, or the fact that the law of another country may attribute the income to a different person. This is the case irrespective of whether the conflicting attribution rule of the other country is of general application, or has an anti-abuse character, or is a deemed attribution rule imposed by law.

3.1.2. Treaties

In determining whether a treaty applies to domestic source income, Belgium will, as a general rule, apply its own domestic law to identify the person who is entitled to claim treaty benefits. A particular issue can therefore arise when a different person is regarded as the taxpayer under the law of another (treaty) country.[53] In most cases Belgium will disregard the attribution in the other country and continue to apply its own attribution rule to determine who is entitled to claim treaty benefits. In this respect, it does not make any difference whether the conflicting attribution rule of the other country is an anti-abuse rule or one of more general application. There may be situations, however, where the attribution in the other country is likely to prevail and the treaty benefits granted on the basis of that attribution. This can for instance be the case where the entity to which Belgium attributes the income is not entitled to claim treaty benefits because of its transparent treatment in its country of residence.[54] These principles are illustrated hereafter.

If Belgium attributes income to (X), a resident of country (A), and the law of country (A) regards a different person (Y), also resident in that country, as being the taxpayer, then in practice, treaty benefits should nevertheless be available in

[53] This is especially so since treaties concluded by Belgium do not contain any specific provision dealing with attribution conflicts.

[54] This principle can be drawn from a *mutatis mutandis* application of the principles on which the recent ruling decisions on the tax treatment of UK LLPs are based (see section 2.1.1). The Ruling Commission considers that, since a UK LLP is as such not entitled to claim treaty benefits, only the partners of that LLP are entitled to claim treaty protection, and the rules regarding the allocation of income under the treaties should therefore be applied at the level of these partners. Decisions of the Ruling Commission cannot be invoked as such as a precedent by other taxpayers. However, given the principles of good administration, one can assume – or at least hope – that basic principles on which the aforesaid decisions are based will not be applied differently with respect to other taxpayers.

Belgium.[55] The fact that country (A) would not be prepared to issue a residence certificate in the name of (X) should not be harmful in itself.[56] If, because of their respective tax attributes, (X) and (Y) are conceptually entitled to different treaty benefits, it is not entirely certain which ones will ultimately prevail. In practice, Belgium is likely to grant only the treaty benefits that (X) is entitled to claim.[57] If those applicable to (Y) are more beneficial, (Y) may try to obtain such higher benefits via the competent authorities' procedure, but this is unlikely to be successful.

The situation is even more complicated if Belgium attributes the income to (X), a resident of country (A), and the law of country (A) and/or the law of a third country (B) regard a different person (Y), who is resident in third country (B), as being the taxpayer. In this respect, a distinction probably needs to be made between situations where Belgium is the country that, originally, does not recognize a transparent treatment applicable in country (A) and/or country (B), and situations where, on the contrary, Belgium is the country that applies a transparent treatment which country (A) and/or country (B) do not apply or recognize.

The first kind of situation will for instance be encountered when (X) is an entity that is treated as a transparent entity under the law of country (A), of which residents established in third countries are the shareholders or participants. In such a case, Belgium will normally apply the treaty benefits provided under its treaty with country (A), except if because of its tax transparent treatment (X) does not qualify as a resident of country (A) for the application of that treaty (which has to be verified on a case-by-case basis). If, for the above reason, (X) cannot invoke the treaty benefits provided in the treaty with country (A), then Belgium will, on the basis of a *mutatis mutandis* application of the principles on which the recent ruling decisions on the tax treatment of UK LLPs are based,[58] in principle be obliged to grant the treaty benefits that (Y) is entitled to claim under the treaty that Belgium has concluded with country (B).[59] If (X) can invoke the treaty benefits provided in the treaty with country (A), but the treaty benefits that (Y) could claim under the treaty with country (B) are more beneficial, it is unclear how Belgium will react. At first sight, the Belgian tax

55 At least to the extent that (X) qualifies as a resident of country (A) for treaty purposes and that he can therefore claim treaty benefits. If (X) cannot be considered as a resident of country (A) for treaty purposes because of the transparent treatment applicable in country (A), then Belgium should in principle grant the treaty benefits that (Y) is entitled to claim. It is unclear how Belgium would deal with a situation where (X) could not claim treaty benefits, but for a reason which would be independent from the attribution rule applicable in country (A).

56 In most cases, formalities required for benefiting from a particular treaty reduction can indeed not be seen as "constitutive" elements for the benefit of that reduction. See Trib. Gand, 9 June 2004, *Act. Fisc.*, 2004/38, 2.

57 This is because Belgium will in principle consider that its domestic attribution rule prevails (at least to the extent that (X) qualifies as a resident of country (A) and that he can therefore claim treaty benefits).

58 See above.

59 This is at least so if both country (A) and country (B) regard (Y) as the beneficiary of the income. The same should in principle also apply if only country (A) considers that (Y), which is a resident of country (B), is the beneficiary of the income, but that may be more difficult to obtain in practice if country (B) does not provide the adequate residency certificate.

authorities are likely to grant only the treaty benefits that (X) is entitled to claim.[60] This is because Belgium will consider that its domestic attribution rule prevails, and that the principles derived from the aforesaid ruling decisions do not apply since (X), which is considered as the taxpayer from a Belgian tax perspective, is entitled to claim treaty benefits. The general principle according to which the most beneficial tax treaty can be invoked will probably not be helpful here because it normally only applies when the same taxpayer can invoke two different treaties.

Alternatively, situations can arise where Belgium applies a transparent treatment to attribute the income to (X) in country (A), while country (B), of which intermediary entity (Y) is a resident, does not recognize such transparent treatment.[61] In that case, Belgium will usually deny the treaty benefits claimed by (Y) and grant only the treaty benefits that (X) is entitled to claim (if any). An example is the situation arising from the certification of shares. In that case, even if the country in which the issuer of the certificates is established does not apply a transparent treatment, Belgium will only grant the treaty benefits that can be invoked by the certificate-holders (if any).[62] However, there may be situations where the precedence of the own attribution rule is not that obvious, for instance when the attribution conflict results from a specific deemed attribution rule, like the one applicable for the taxation of sportsmen and artists (see section 2.1.2).

Finally, there is the situation where Belgium attributes the income to a Belgian resident (X), but where the law of another country (A) regards a different person (Y), resident in that country, as being the taxpayer. If such attribution conflict arises from the fact that country (A) applies a transparent treatment that Belgium does not apply, no account will be taken of that transparency treatment. If the attribution conflict arises from the fact that Belgium applies a transparent treatment to attribute the income to its resident (X), while country (B), in which intermediary entity (Y) is established, does not recognize such transparent treatment, Belgium is likely to deny the treaty benefits claimed by (Y), because it will consider that its own attribution rule prevails.

3.2. Residence country taxation

From the perspective of the residence country, the importance of the attribution issue is twofold: first of all in order to determine whether a resident person is taxable in respect of foreign source income, and whether a residence certificate can

60 The same obviously applies if both Belgium and country (A) consider (X) to be the taxpayer, and only country (B) considers that the income should be attributed to its resident (Y).

61 At first sight, the conflict situation arising when only country (A), of which (X) is resident, does not recognize the transparent treatment (but country (B) of which the intermediary (Y) is resident does) is not likely to cause any big issue in practice. Indeed, in that case, Belgium should normally grant the treaty benefits available to (X) under the treaty with country (A), at least provided that (X) is a resident of country (A) for treaty purposes and therefore entitled to claim treaty benefits (although practical difficulties may arise if country (A) does not provide the adequate residency certificate).

62 As to this principle, see among others L. de Broe, "Fiscale aspecten van het certificeren van Belgische aandelen middels een Nederlandse Stichting-Administratiekantoor", TRV, 1991, 115 (125).

be issued; and secondly to determine whether double taxation relief can be claimed in respect of foreign source income.

3.2.1. Taxable person

As a general rule in Belgium, the attribution of foreign source income for domestic taxation purposes is not affected in any way by the attribution of that income in the source country or under the law of a third country. In this context, it does not, for instance, make any difference for the domestic taxation of a Belgian entity to which foreign source income is attributed pursuant to Belgian law if the source country or a third country regards that Belgian entity as a conduit or as a CFC and attributes the income to another person. As a general rule, the same applies if Belgium (as the residence country of the ultimate beneficiary of foreign source income) regards an intermediary entity as a conduit or as a transparent intermediary, while the source country or the country of which such intermediary entity is resident does not.[63] Interesting also is the reverse scenario: if foreign source income is received through an entity established in a third state that both the source country and the third state regard as transparent for tax purposes (following which they consider that the Belgian resident is taxable in respect of that income), while Belgium does not, that foreign source income will not be considered to be taxable in the hands of the Belgian resident for Belgian tax purposes.[64]

In each case where Belgium considers that a Belgian resident is the beneficiary of certain foreign source income, the Belgian tax authorities should not have any problem confirming this in a residence certificate for treaty purposes. However, this is unlikely to be helpful if the source country considers another person to be the beneficiary of that income. Interestingly, if that other person is also resident in Belgium, the Belgian tax authorities may in practice nevertheless be able to issue a certificate of residence confirming that this person is a resident of Belgium for treaty purposes.[65] Different is the question where certain foreign

63 In practice, there will probably be few situations of that kind, but one example could be the case where foreign source dividend income is received via a foreign administration office that has issued certificates in exchange for the underlying shares. In that case, Belgium will, if certain conditions are met, tax the Belgian certificate-holders as if they had received the dividends directly, even if the source country takes a different view.

64 In that case, only the income received from the foreign intermediary company may be taxable in Belgium, although in practice Belgium will often be prevented from taxing that income in application of the double tax treaty concluded with the state where the intermediary entity is established. An example is the Belgian tax treatment of income received from/through French *sociétés civiles immobilières*. See Cass., 2 December 2004, FJF, 2007/7, 657; JDF, 2004, 7–8, 221, note C. Docclo. See also Ph. Hinnekens, "Bénéfices distribués par une SCI française: exonération en Belgique", *Fisc. Int.*, 252, 1. Another interesting application of this principle is to be found in the rulings on the UK LLP.

65 A mere residence certificate without explicit reference to the income at stake is indeed a mere prima facie confirmation of residence status and the tax authorities will often not investigate into the beneficial ownership entitlement of the taxpayer before granting it. See Th. Denayer, *Practical issues in the application of double tax conventions*, branch report for Belgium, *Cahiers de Droit Fiscal International*, vol. 83b, 1998, pp. 249–250. The residence certificate will, however, be more difficult to obtain if it requires a confirmation that the taxpayer is taxable on the income at stake as the beneficial owner thereof.

source income is attributed to a Belgian resident pursuant to the law of the source country, while neither that person nor any other person resident in Belgium is considered to be the beneficial owner thereof pursuant to Belgian domestic law. In that case, the Belgian tax authorities may possibly issue a general certificate of residence, but probably not if it requires confirmation that the Belgian resident is taxable on the income at stake as the beneficial owner thereof. An interesting example in practice would be the case where foreign source income is received through an entity established in a third country that both the source country and the third country regard as a transparent entity while Belgium does not.[66]

3.2.2. Double taxation relief

If foreign source income is attributed to a Belgian resident pursuant to Belgian domestic law, the next question is whether Belgium will grant double taxation relief to that resident in respect of the income, irrespective of possible attribution conflicts.

There is no clear answer to that question, and a distinction may have to be made depending on the method of relief against double taxation (exemption or credit) that Belgium would normally be under an obligation to apply with respect to the income at stake.

If Belgium attributes foreign source income to a Belgian resident, which it is normally obliged to exempt in the hands of that resident pursuant to the treaty with the source country, the fact that such income is attributed to another person according to the law of the source country and that it is taxed in the hands of that other person should normally not be harmful to the application of the exemption in Belgium. This results, among other things, from the fact that most of the treaties concluded by Belgium do not require, as a condition for the exemption in this country, that the income received by a Belgian resident from a source in the other country has been subject to effective taxation in that other country.[67] It is often enough for the exemption to be applicable that this income "may be taxed" or "is taxable" in the source country in accordance with the provisions of the treaty. Belgium, being the country applying the treaty in respect of the elimination of double taxation, is in principle able to determine independently whether that test is satisfied, and it should not be bound by the interpretation made in the source country in that respect.[68]

66 As could for instance be the case with respect to foreign source income that Belgian partners of a UK LLP receive through that LLP.

67 With the exception of the treaties with the USA and Canada, and of those with the Netherlands and Hong Kong. See *Fisc. Int.*, 269, 7.

68 See also Cass., 26 April 2001 (*Arr. Cass.*, 2001, 5, 731; *Fiscologue*, 801, 3) which confirms that the absence of effective taxation in the source country is as such not harmful for the exemption. An uncertainty, however, arises from the last paragraph of the Administrative Circular of 16 January 2004 on the application of double tax treaties, according to which Belgium (as a residence country) would not be obliged to exempt income which, according to the source country, is not taxable there under the provisions of its treaty with Belgium. It is unclear whether that administrative approach could also apply in a situation where the source country does not apply the treaty with Belgium with respect to certain income because it considers a person resident in a third state to be taxable in respect of that income and applies the treaty with that country instead of the treaty with Belgium.

The situation is probably less clear with respect to interest and royalty income for which the credit method is often the relevant method for the elimination of double taxation. Except where a tax sparing clause applies, a Belgian resident claiming a foreign tax credit has indeed to prove that the income in respect of which such credit is claimed has effectively borne the relevant foreign tax.[69] The question can therefore be raised whether Belgium could refuse to grant the credit if the foreign tax has effectively been levied, but the source country levied such tax on the basis that a different person was the taxable person. There are probably good arguments to consider that in such a case Belgium should grant a credit for the foreign tax withheld. It should indeed be enough to prove that the relevant amount of foreign tax has been withheld, and that the amount of tax has at some point been transferred to the foreign tax authorities.[70] There is no explicit requirement in the law that the foreign tax must have been levied in the hands of the Belgian resident, in order for that resident to be able to claim the benefit of the foreign tax credit. However, if, because of the conflict in attribution, a higher withholding tax applies than that provided under the treaty between Belgium and the source country,[71] Belgium is likely to grant a credit only for the amount of withholding tax permissible under its own treaty with the source country, and subject to the rules provided in that treaty.

69 Art. 285 ITC.

70 B. Peeters, "La QFIE et la condition d'assujettissement de l'article 187 CIR", *Fisc. Int.*, 66, 22 June 1989, 1.

71 Because the source country attributes the income to a resident of a third country and applies the rate provided in the treaty with that third country.