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Subject 1: Enterprise Services

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Introduction

Purpose of the Report

- "Consider the policy and practical aspects of how jurisdictions apply their income tax rules to the provision of services to enterprises."

Why

- Cross-border trade in services have become very important
- Tax rules however are often less developed and uniform than the rules for trade in goods

Agenda

1. Taxation of income of services under domestic law
2. Treaty issues

Domestic Law

- basic rules
- income classification
- source and nexus
- gross versus net taxation
- compliance

Domestic Law

Income classification

Definition of services

- Four categories of taxation
- Four categories of taxable income under the personal income taxation

→ No particular reference to services

Domestic Law

Income classification

Definition of services

Article 24 BITC: "... income from operations through establishments of all industrial, trade or agricultural enterprises."

➡ Service companies are not mentioned

➡ fallback on general rules for ordinary income

Domestic Law

Income classification

Services versus Royalties

- Distinction is important: e.g. withholding tax
- Article 17 § 1 BITC and the Commentary

➡ Service companies are not intended to be included in the definition of royalties

- Issue of closely linked transactions

Domestic Law

Income classification

Embedded intangibles

- ➞ intangible assets embedded in service agreements
- ➞ business restructuring: Chapter 9 OECD Guidelines
- ➞ ongoing relation: TP

Domestic Law

Source and nexus

Focus on non-resident service providers

"When will a non-resident service provider be taxable in Belgium ... or not"

Professional income: - realised through Belgian establishment

- realised without Belgian establishment

Domestic Law

Source and nexus

- 3 categories of professional income taxable in Belgium <u>without</u> Belgian establishment:

  - Profit from insurance activities
  - Profit from director position or similar
  - Independent professional activities

Domestic Law

Source and nexus

- Income from artists and athletes
  - ➢ personal presence in Belgium
  - ➢ irrespective to whom it is paid
- Diverse income
  - ➢ in between professional activity and normal management of private assets
  - ➢ rare in its application

Domestic Law

Gross versus net taxation

- Basic principle: net taxation
- Lump-sum taxation in the absence of separate set of accounts
- Withholding tax: income taxable without Belgian establishment

ENTERPRISE SERVICES

PART II: Treaty issues

1. Income from services under Article 7
2. Income from services treated as royalties
    - Supply of know how
    - Secondment of employees
3. Fees for technical services
4. Independent personal services

1. Income from services under Article 7

- Belgian treaty policy is reflected in the "Belgian Model".
- General rule similar to the rule provided under Articles 5 and 7 of the OECD Model.
- An enterprise of one State should be taxable in another State only if it participates actively in the economic life of the other State. This is only the case if the enterprise performs services in that State through a fixed place of business.
- Some Belgian treaties follow Article 5(3)(b) of the UN Model.

1. Income from services under Article 7

Article5(3)(b) of the UN Model:

"The term "permanent establishment" also encompasses the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (<u>for the same or a connected project</u>) within a Contracting State for a period or periods aggregating more than <u>six months</u> within any twelve-month period."

1. Income from services under Article 7

- Misuse of Article 5(3)(b): an enterprise divides a contract into several parts, each covering activities lasting less than the six months period and attributes parts of the contract to companies of the same group.

- Treaty provisions.
- The BTA propose to include an anti-avoidance rule in domestic law.

1. Income from services under Article 7

- Only business profits attributable to a “Belgian establishment” are taxable under domestic law.
- Where Article 5(3)(b) allows Belgium to tax business profits, profits are not always taxable under domestic law.
- To avoid any gap between treaty provisions and domestic law, the BTA propose to amend the domestic law. Where a treaty deems a PE to exist, that PE would constitute a “Belgian establishment” and income attributable to it would be taxable under domestic law.

1. Income from services under Article 7

- Article 5(3)(b) applies notwithstanding the construction site provision (even if not expressly mentioned). Tax consequences, especially, if the time threshold is shorter under Article 5(3)(b).
- Article 5(3)(b) applies only to services provided by an enterprise to third parties. Article 5(4) covers preparatory and auxiliary activities provided to the enterprise itself and Article 5(4)(d)to(f) refers to "the maintenance of a fixed place of business".

1. Income from services under Article 7

Force of attraction:

- Only the treaties with India, Nigeria and Vietnam include, without any restriction, Article 7(1)(c) of the UN Model, which provides for the "force of attraction" principle in respect of profits derived from activities similar to those carried on by a PE.
- Other treaties expressly subject the application of that principle to the evidence that the similar activities were structured in a manner intended to avoid taxation in the PE State or to the fact that the transactions are connected with the PE or occur regularly.

2. Income from services treated as royalties

Know How:

- Paragraphs 11 to 11.6 of the OECD Commentary on Article 12 (Royalties) circumscribe the scope of payments as a consideration for the provision of know how.
- The OECD Commentary clearly distinguishes those payments from payments for the provision of services requiring the use, by the supplier, of special knowledge, skill or expertise in order to provide the services.
- The BTA follows the OECD Commentary when applying a treaty providing for a withholding tax on royalties.

2. Income from services treated as royalties

- Belgium is reluctant to include payments for technical services in the definition of royalties.
- It is, however, the case with Argentina, Brazil, Morocco and Tunisia (services performed within the source State) and with Australia, Bulgaria and Portugal (services ancillary to the use of rights, property or information mentioned in the definition of royalties).
- 5%, 10% or 11% on the gross amount.
- The BTA propose to modify domestic law to enable Belgium to tax income from such services.

2. Income from services treated as royalties

Employee seconded to a Belgian enterprise for the purpose of providing expert skills to that enterprise.

- The fees paid by the Belgian enterprise are not treated as royalties but as a service fee.
- If the secondee performs work belonging to the business of the Belgian enterprise (employment exercised under the authority and supervision of the Belgian enterprise), the seconding enterprise does not have a PE in Belgium.
- If the secondee performs the business of the seconding enterprise for the benefit of the Belgian enterprise (employment exercised under the authority and supervision of the seconding enterprise), the foreign enterprise may have a PE in Belgium.

3. Fees for technical services

- Specific provisions on technical fees are not common in Belgian treaties.
- The treaties with Ghana, India and Rwanda provide for taxation of fees for "services of a technical, managerial or consultancy nature" in the State of the payer. Limited rate of 10%.
- Those services are not defined in the treaties nor under domestic law. The BTA refers to section 5 of the OECD Report on treaty characterisation issues arising from e-commerce.

3. Fees for technical services

- Belgium does not favour taxation at source of income from services not performed in the source State nor taxation on a gross amount.
- This policy is reflected in domestic law.
- When Belgium must depart from its policy in a treaty, it should be able to levy the tax provided in the treaty.
- The BTA propose to modify domestic law so that Belgium may levy tax according to domestic law on income taxable in Belgium in accordance with a treaty.

4. Independent personal services

- The Belgian Model does not include Article 14 relating to independent personal services.
- Most Belgian treaties contain, however, an Article 14.
- 33 treaties provide for a presence test (a 183-day presence test; in a few cases, a shorter test). The treaty with Pakistan provides for a revenue threshold.

4. Independent personal services

- Article 14 is not applicable to companies.
- Applicable to transparent entities.
- Income dealt with under Article 27 of the ITC.
- "fixed base regularly available to him" same meaning as "fixed place of business" used in Article 5(1) of the treaty.
- Income derived from activities carried on through the fixed base, including the services furnished outside Belgium but excluding the services performed outside Belgium.
- Taxation on a net basis.