Branch Reporters
Claudine Devillet*
Xavier Van Vlem**

Summary and conclusions

The services sector is contributing to economic growth and job creation worldwide. It provides support to the whole economy and industry of developed as well as developing countries. Technological developments increase the cross-border tradability of services, such as services for finance, education, health and government. The increased liberalization in the sector of services also facilitates international trade in services.

Being an open economy, Belgium seeks to facilitate access to its services by foreign users as well as access by its residents to services provided from abroad. This policy is reflected in the circumstances in which Belgium will tax, according to its domestic law and treaties, the income from the services of non-resident providers.

Under Belgian domestic law, income from the provision of services is, as a general rule, treated as ordinary income and subjected to the usual rules applicable to the determination of taxable income. Non-residents are only taxable in Belgium on income that is derived from Belgium and subject to taxation according to the Belgian income tax code. As a result, a foreign enterprise providing services in Belgium is in principle only taxable in Belgium on the income attributable to a fixed place situated in Belgium through which the enterprise is providing such services. If the foreign enterprise does not provide services in this way, it is not regarded as participating in Belgium's economic life and therefore not taxed in Belgium. Domestic law provides, however, for particular rules for the taxation of income from services provided by foreign insurance enterprises, income from services performed by non-resident artistes and sportsmen and income from independent professional services performed by non-resident individuals. Such income is taxable in Belgium even if not obtained through the intervention of a fixed place situated in Belgium. In addition, a non-resident can become taxable in Belgium on income derived, outside any professional activity, from services rendered in Belgium to third parties. Such income is taxable as miscellaneous income.

The mere fact that the payer of the consideration for services is a resident of Belgium or that the services are used in Belgium is generally not sufficient to justify taxation under domestic law.

* Director a.i., International Income Tax Division Administration of Fiscal Affairs
** Partner PwC, International Tax and Transfer Pricing Services, Belgium

The basic principle under domestic law is that taxation occurs on a net basis. Consequently, income from the provision of services that is taxable in Belgium will generally be limited to the net amount. There are only two exceptions to this basic principle. Under limited conditions, the law provides for a lump-sum taxable basis with an absolute minimum and in a limited number of cases a withholding tax constituting the final tax burden is levied.

The Belgian model tax convention that reflects the treaty policy practised by Belgium follows the permanent establishment (PE) definition found in paragraphs 1 and 2 of article 5 of the OECD model. It includes neither a specific service PE provision in article 5 – deeming a PE to exist where one would not otherwise exist under paragraphs 1 and 2 – nor a specific article dealing with independent personal services nor specific provisions dealing with technical or other services. Belgium considers indeed that the provision of services should, as a general rule, be treated the same way as other business activities and that the PE requirement should also apply to the provision of services by an enterprise or by an individual performing independent personal services. The PE requirement avoids increasing the compliance and administrative burden of enterprises and tax administration as well as excessive gross taxation.

Belgium is reluctant to provide in a treaty for source state taxation rights on income derived from services that are not performed in that state and to allow the state of residence of the payer to tax the gross amount of the fees. Gross taxation may be arbitrary and excessive (especially where the service provider (SP) subcontracts part of the contract). The net margins differ greatly depending on the business sectors and circumstances; it is therefore difficult to set an appropriate rate of taxation on gross income. This treaty policy is, generally, in accordance with Belgian domestic law.

Some Belgian treaties follow, however, article 5(3)(b) of the UN model (with or without deviation). Some treaties include payments for technical services in the definition of "royalties". Some other treaties contain specific provisions providing for taxation in the state of the payer – and on a gross amount – of fees for services of a technical, managerial or consultancy nature. In this case, Belgium sometimes allows the recipient of the income to choose to be taxed on a net basis as if the activities were exercised through a PE.

It appears that an increasing number of countries consider that the state of the payer of the fees for services should be considered as the state of source of the income and should have the right to tax such fees even where the services are performed outside that state. In view of this trend, the Belgian tax administration (BTA) has come to consider that, when Belgium must depart from its policy in a treaty, it should be able under domestic law to tax the income that it is allowed to tax as the state of source under the treaty. The BTA has therefore proposed to modify Belgian law so that:

- where a treaty deems a PE to exist, that PE will constitute a Belgian establishment (BE) and income attributable to that establishment will be taxable on a net basis under domestic law;
- Belgium will be allowed under domestic law to apply the withholding tax provided for in a treaty on the gross payments for services not performed in Belgium.

Those new provisions would only apply where a treaty allowed Belgium to tax the income. In the absence of a treaty, the BTA considers indeed that the nexus with Belgium is too tenuous to justify creating possible double taxation. Where income is taxable in Belgium in accordance with a treaty, the provisions of the treaty require that relief from double taxation be granted by the state of residence.

1. Taxation of income from services under domestic law

1.1. Basic rules

Under Belgian domestic legislation, income from the provision of services is considered as ordinary income and subject to the general rules applicable to the determination of taxable income.

As regards Belgian source income earned by non-residents, which is taxable in Belgium, the taxable basis is determined in the same way as for residents, thus on a net basis. Only under limited conditions is a lump-sum taxable basis with an absolute minimum provided for[1] and in a limited number of cases a withholding tax is levied which constitutes the final tax burden.[2]

A Belgian corporation can claim a deduction for payments (or accruals) made to foreign entities for services rendered, as if the payment was made to a Belgian resident, if the amounts paid are at arm's length.[3] However, when such payments are made, either directly or indirectly, to a foreign person, entity or branch which is not subject to tax or is subject to a tax regime that is notably more advantageous than the Belgian tax regime on such income, there is a more stringent burden of proof.[4] Indeed, also under article 49 of the Belgian Income Tax Code (BITC), the burden of proof is with the entity claiming the deduction. However, the conditions laid down under article 54 BITC include additional proof of the "genuineness and sincerity" of the transactions to which these payments relate. Such charges will thus be disallowed unless the Belgian enterprise can prove that the payments are reasonable and that they correspond to genuine and real transactions.

In addition, as of 1 January 2010, companies subject to Belgian corporate income taxation or Belgian non-resident corporate income taxation that make direct or indirect payments to recipients established in tax havens are obliged to declare them if they are equal to or exceed 100,000 euro during the tax year. The reporting has to be made on a special form to be attached to the (non-resident) corporate income tax return. In the event of non-reporting, the "payments"[5] will be

1 Art. 182 Royal Decree to the Belgian Income Tax Code (RD/BITC).

2 Art. 87 RD/BITC.

3 Under art. 49 BITC other conditions for deductibility of costs apply: "are deductible as professional expenses the costs made or incurred during the taxable period to generate or maintain taxable income ('benefit test') the genuineness of which needs to be demonstrated".

4 Art. 54 BITC.

5 The relevant article in the BITC refers to "payments" but the provision can only be applied if there is a cost recorded in the statutory accounts.

disallowed expenses for income tax purposes. Where the payments have been reported duly and timely, their tax deductibility will be subject to the ability of the taxpayer to prove that (a) the payments were made as part of genuine, proper transactions and (b) they were not made to an entity under an artificial construction.

A tax haven is defined as: (a) a jurisdiction regarded by the OECD as not being cooperative concerning transparency and international exchange of information or (b) a jurisdiction where the nominal corporate tax rate is less then 10 per cent. A royal decree containing the list of countries where the nominal corporate tax rate is lower than 10 per cent is published.[6]

The BITC provides for particular rules for taxation of income from non-resident artistes and athletes. Indeed, the income is taxable in Belgium if it relates to a performance personally made in Belgium in the capacity of an artiste or athlete. This is also the case even if the income is attributed to another individual or legal entity.[7] The duration of the performance, the place where the income is received and the residence of the third party receiver are irrelevant.[8] The tax due on these performances is levied through an 18 per cent wage withholding tax on the gross amount less a limited lump-sum cost deduction.[9]

Profits derived by non-residents through the exploitation of vessels or planes that they own or charter, and that call at Belgium, are excluded from taxation under the non-resident corporate income taxation, subject to the condition of reciprocity.[10]

1.2. Income classification issues

1.2.1. Definition of services

The BITC has defined four categories of taxation: personal income taxation, corporate income taxation, legal entity taxation and non-residents taxation.[11] The BITC is structured so that the broadest description of taxable income is included in the section on personal income taxation. The other categories of taxation often refer to the section on personal income taxation for the determination of taxable income, obviously supplemented with particular provisions proper to the respective taxation.

Under personal income taxation, four different categories of taxable income are defined:[12] immovable income, income from movable assets and capital, professional income[13] and miscellaneous income.

Under none of the above categories can one find a particular reference to services. In addition, article 2 BITC provides for an exhaustive list of definitions of terms used in the BITC; however, services are not included in this article.

The question arises of whether one needs a particular definition of services from the perspective of profit taxation. Indeed, the notion of "profit", relevant for

6 Art. 179 RD/BITC.
7 Art. 228, §2, 8 BITC.
8 E. Schoonvliet, *Source and residence: new configuration of their principles*, IFA 2005, vol. 90a.
9 Art. 87, 5(d) RD/BITC.
10 Art. 231, §1, 3 BITC.
11 Art. 1, §1 BITC.
12 Art. 6 BITC.
13 That section includes definitions on, among other things, "profit".

personal income taxation and corporate income taxation as well as non-residents taxation, is very broadly defined under article 24 BITC.[14] It especially includes income derived from operations through establishments of all industrial, trade or agricultural enterprises. It is worth mentioning that "service companies", constituting a very important pillar in today's economy, are not explicitly included in the list of categories of enterprise. There is, however, no doubt that service companies also are captured by the definition of article 24 BITC. As a consequence, under for example corporate income taxation, in principle all income received by a company is considered business income.[15]

It is, however, clear that for example the provision of advice, construction activities, acting as a broker, provision of financial backing or support, the provision of insurance or a financial guarantee, etc. are captured under the notion of provision of services and, if rendered for example by a resident company, are subject to corporate income taxation.

Equally, also largely automated activities such as telecommunications, online games or gambling activities or any other kind of electronic commerce are under the BITC implicitly considered as services. The question of whether or not these activities lead to taxation in Belgium is to be answered by applying the general rules.

As regards related-party services, no particular rules apply except that the payment for those services needs to respect the arm's length principle. There is, however, a lot of jurisprudence on the provision of services between related parties, especially as regards the genuine nature of the services.

As mentioned above, construction services also qualify for the notion of the provision of services. It is important to mention in this respect that the threshold for constituting a BE[16] under Belgian domestic rules for building and construction works is set at 30 days.[17]

1.2.2 Services v. royalties

As mentioned above, under personal income taxation, four different categories of taxable income are defined:[18] immovable income, income from movable assets and capital, professional income and miscellaneous income.

Under the BITC, royalties are captured in the section on income from movable assets and capital. That section includes, among other things: (a) dividends, (b) interest, (c) income from renting, use and concession of movable goods and (d) income from the concession or assignment of copyright or related rights as well as licences.[19] It is the categories (c) and (d) that are of importance when defining royalties under the BITC.

The BITC in itself does not provide a further clarification on what needs to be captured under categories (c) and (d). However, the official commentary to the

14 Other articles of the BITC also refer to "profit" but the main article in this respect is art. 24 BITC.
15 Art. 183 juncto 24 BITC.
16 See further on what is considered a BE.
17 Art. 229, §1, 8 BITC.
18 Art. 6 BITC.
19 Art. 17, §1 BITC.

BITC[20] provides for useful clarification on these concepts and also includes a non-exhaustive list of what is to be included in both categories of income.

Thus under income from renting, use and concession of movable goods (category (c)) needs to be included (non-exhaustive):[21]

- income from renting of household goods in houses or apartments;
- income from renting of chairs, tents;
- income from renting of vessels, etc.

Under income from the concession or assignment of copyright or related rights as well as licences (category (d)) needs to be included (non-exhaustive) income received from granting rights to exploit or use:[22]

- patents;
- manufacturing procedures;
- broadcasting rights of movies, radio or television programmes, etc.

From the above, one can deduce that services are not intended to be included in the definition of royalties. The commentary even goes one step further. For income from renting of household goods in houses or apartments it is stipulated that if the renting includes continuous services or maintenance by the recipient of the income, the income is to be considered as professional income. In other words, by providing this example, the commentary clarifies the intention of the BTA to make a distinction between on the one hand income from granting rights on movable assets or rights (movable income or royalties) and, on the other hand, income from activities or services which are not captured by the provision on royalties but by the provisions on professional income.

Although the BTA has expressed its views on the distinction between royalties and services, there are no particular additional provisions addressing the situation whereby a contract provides for both the transferring or licensing of property and the provision of services. The reporters are unaware of any guidance by the tax authorities or courts in this respect.

Given the different tax consequences of the classifications, one could opt to apply for a ruling on this matter with the Belgian Service for Advance Decisions. As of 1 January 2003, the Belgian government introduced a new ruling practice that seeks to increase upfront legal certainty for investors, while taking into account national and international tax standards.

Under the new regime, a ruling is defined as an "upfront agreement", and it is is a legal act by the Federal Public Service of Finance in conformity with the rules in force with respect to the application of law to a specific situation or operation that has not yet produced a tax effect. Such a ruling could avoid interpretation issues and allow taxpayers to ascertain the proper tax consequences of the transactions they are involved in.

As regards transfer pricing, the key element is to assess the arm's length nature of the transactions. The OECD Transfer Pricing Guidelines recognize the difficulty that may arise in assessing the arm's length nature of separate transactions that are

[20] The official commentary to the BITC is issued by the BTA and provides useful guidance on the interpretation of the BITC. It is a useful source of information for taxpayers and binding on tax inspectors. Belgian courts also often rely on the commentary, albeit it is not binding upon them.

[21] 17/3 commentary to the BITC.

[22] *Ibid.*

closely linked to each other. In such cases, it may be necessary to assess closely linked transactions or package deals jointly from a transfer pricing perspective. An example of closely linked transactions or package deals could be a licence for patents combined with the provision of technical and administrative services.[23]

There are no particular provisions in the BITC or in the commentary or through court decisions that provide guidance on how to deal in this respect with closely linked transactions. Yet the BTA adheres to the OECD Transfer Pricing Guidelines which can thus be used as a basis to deal with such closely linked transactions. However, the OECD Transfer Pricing Guidelines only deal with the transfer pricing aspects and do not address the classification issue between services and royalties.

As a consequence, in the absence of clear provisions in the BITC, the commentary or through court decisions, discussions on classification of income as income from either services or royalties may continue with regard to closely linked transactions. As mentioned above, an application for a ruling could provide a solution in this respect.

1.2.3. Embedded intangibles

As mentioned above, Belgium adheres to the OECD Transfer Pricing Guidelines. Also as regards business restructuring, Belgium will follow the guidelines expressed in Chapter 9, "Transfer Pricing Aspects of Business Restructuring" of the OECD Transfer Pricing Guidelines. No additional provisions are included in the BITC or commentary in this respect.

There is, however, no doubt that if a cross-border (i.e. out of Belgium) transfer of protected assets, whereby the protection stems from law or contract (or proprietary rights in such assets), occurs, an "exit tax" in economic terms would become due in Belgium which crystallizes as a capital gain (only if there is an asset from a Belgian accounting perspective) subject to taxation.

In an ongoing relation, thus not in the case of a business restructuring, a potential transfer of intangible assets embedded in service agreements should in the reporters' view be tackled through transfer pricing. In other words, an arm's length remuneration should be recognized for the service provided, including potentially embedded intangible assets. It may be difficult to recognize an alienation of intangible assets for tax purposes as such but the value of the transaction set up as a service should nevertheless be recognized through the price paid for the service rendered.

On the assignment of employees, the 2007 IFA Kyoto Congress general report on *Transfer pricing and intangibles* provides useful insights.[24] There appears to be a general trend of not recognizing the assignment of employees with technical knowledge and expertise as a transfer of intangibles as the intangible is personal to the employee. This is in the reporters' view also true from a Belgian perspective. In the Belgian report for the 2007 IFA Congress,[25] it was recognized that the

[23] 3.11 OECD Transfer Pricing Guidelines.

[24] T. Miyatake, *Transfer pricing and intangibles*, *Cahiers de droit fiscal international*, vol. 92a, SDU Fiscale & Financiële Uitgevers, p. 30.

[25] I. Verlinden, *Transfer pricing and intangibles*, IFA 2007, pp. 101–121.

knowledge of key employees sent from their home base to manage for example a new facility could be extremely valuable. Nevertheless, a physical person *per se* cannot be seen as an intangible. Consequently, the value embedded in a labour agreement can be substantial and other employers may envy the current employer for having that person on board. However, as "taking ownership" of an employee is legally impossible, as it would be forcing someone to commit to long-term or life-time employment, it appears impossible to argue that an intangible is transferred upon seconding employees to an offshore affiliate.[26] An employment contract transfer can, however, trigger compensation upon transfer as it is a legally protected asset (think e.g. of Formula 1 drivers changing employer).

1.3. Source and nexus

In general, the taxable basis for residents consists of their worldwide income less allowable deductions. As a consequence, foreign source profits (from services rendered abroad) not exempt from taxation by virtue of a double tax treaty are taxable at the basic corporate tax rate in Belgium. Income realized by foreign branches located in countries with which Belgium has concluded a double tax treaty is exempt from corporate income tax.

On the other hand, income derived by non-residents is only taxable in Belgium if that income is derived in Belgium and subject to taxation according to the BITC.[27]

As under personal income taxation, similar categories of taxation are defined under non-residents taxation:

- immovable income;
- income from movable assets and capital;
- professional income;
- income from artistes and athletes;
- miscellaneous income.[28]

For the purpose of this report immovable income will be disregarded, as will income from movable assets and capital since, as clarified above, services are not intended to be included in the definition of royalties.

1.3.1. Professional income

As regards professional income, an interesting distinction is made between profit:[29]

- realized through a BE;
- realized without a BE.

In this respect, it is important to briefly highlight the fundamental differences between the notion BE under the BITC and the notion PE under the OECD model.[30]

26 *Ibid.*, p. 116.
27 Art. 228 BITC.
28 This category comes in addition to the categories of taxation mentioned under personal income taxation.
29 228/12 commentary to the BITC.
30 L. Denys, "Belgium: The Concept of Permanent Establishment Revisited and Other Reflections Beyond", *Bulletin For International Taxation*, August/September 2008, p. 443.

Those differences in fact weaken under certain conditions the importance of a fixed connecting factor with Belgian territory:[31]

- a building or construction project lasting for an uninterrupted period of more than 30 days forms a BE;[32]
- each representative (other than an independent intermediary acting in the ordinary course of its business) active in Belgium for a non-resident constitutes a BE even if this representative does not have the authority to conclude agreements in the name of that non-resident;[33]
- storage facilities and a stock of goods constitute a BE;[34]
- the definition of a BE does not list or exempt the negative PEs, as in article 5 OECD model, and thus does not exempt solely auxiliary or preparatory activities;
- the members or partners of a business partnership (or similar entity without legal personality) are considered to have a BE whether the entity is a resident of Belgium or a non-resident receiving Belgian source taxable income.[35]

It is important to mention that the source of business profit is irrelevant. Profit obtained outside Belgium by a non-resident enterprise is also taxable in Belgium if the profit has been derived through (among other things) the intervention of a BE.

Consequently, profit derived from services rendered through the intervention of a BE will be taxable in Belgium. In this respect the broader definition of a BE compared to a PE should be emphasized.

However, the broader definition of a BE under the BITC compared to a PE will only be relevant if no double tax treaty is in place. Indeed, it has been explicitly confirmed in Belgian jurisprudence that a double tax treaty prevails over Belgian domestic legislation.

No particular provisions exist in the BITC or its commentary on the taxation of profits from automated activities such as telecommunications, online games or gambling activities. Whether or not profits arising from these activities are taxable in Belgium will be subject to the qualification of those activities as a BE or PE in Belgium. A parliamentary question has clarified under which conditions (foreign) enterprises become liable to taxation in Belgium for electronic commerce type of activities.[36] The parliamentary question explicitly refers to the clarification made by the OECD on this particular topic. As a consequence, the OECD commentary can be used as a guide within the Belgian landscape also in this respect.

1.3.2. Realized without a BE

As mentioned above, in a limited number of cases profits derived by non-residents are taxable in Belgium even though these profits were not obtained through the intervention of a BE. Such profits include certain immovable income but more importantly also:[37]

31 Schoonvliet, *op. cit.*, p. 191.
32 Art. 229, §1, 8 BITC.
33 Art. 229, §2 BITC.
34 Art. 229, §1, 9 and 10 BITC.
35 Art. 229, §3 BITC.
36 Q. & A. Senate, 23 January 2001, Bulletin 2-69 (Q. no. 1123 Destexhe).
37 Art. 228, §2, 3(a) to (e).

- profits derived from activities performed in Belgium by foreign insurance companies (excluding reinsurance activities);
- profits derived through an activity as director, liquidator or similar in a Belgian company;
- income from independent professional activities carried out in Belgium (independent professions include lawyers, doctors, architects, auditors, etc.).[38]

1.3.3. Income from artistes and athletes

As mentioned above, the BITC provides for particular rules for taxation of income from non-resident artistes and athletes.[39] The envisaged income is that derived from activities performed by the athlete or artiste in person. In other words, a personal presence in Belgium is required. It is irrelevant whether the income is attributed to another individual or legal entity. This provision is often included as income is attributed to a theatre office, production entity, managers, etc.

Artistes include musicians, actors, singers, dancers, presenters and quiz-masters but not for example models or film or theatre producers. Athletes include all kinds of sportsmen and women who acquire material benefits from their sports activities.

The duration of the performance, the place where the income is received and the residence of the third party receiver are irrelevant.[40]

However, the income earned by an artiste in Belgium through the sale of records or CDs and copyright income on text or music is not captured by this provision.[41]

1.3.4. Miscellaneous income

It is important to mention that a non-resident can become taxable in Belgium under non-residents taxation outside any professional activity. Indeed, profit derived or income received in return for any kind of performance, action, speculation or services rendered to third parties is taxable as miscellaneous income under non-residents taxation.[42] As mentioned above, this provision does not apply to profits earned within the framework of a professional activity. Nor does this provision apply to profit derived or income received in return for normal management of private assets including immovable property, shares or similar assets and movable assets.[43] The application of this provision is rare.

1.3.5. Exempt income

The BITC also provides for two categories of income derived in Belgium that are not subject to taxation under non-residents taxation, subject to the condition of reciprocity:[44]

38 Art. 228, §2, 4 BITC.
39 Art. 228, §2, 8 BITC.
40 Schoonvliet, *op. cit.*
41 228/47 commentary to the BITC.
42 Art. 228, §2, 9 BITC.
43 The main purpose is to tax speculative income.
44 Art. 231, §1, 3 BITC.

- the profit realized by a non-resident company if obtained through a representative that acts as an "order getter", except for insurers that usually collect insurance contracts other than reinsurance contracts;
- profits derived by non-residents through the exploitation of vessels or planes that they own or charter and that call at Belgium; this includes the profit realized not only directly through transport of freight or passengers but also closely related income common for the transport company.[45]

1.4. Gross v. net taxation

1.4.1. Basic principle: net taxation

The basic principle of taxation under the BITC is net basis taxation. Consequently, and as a principle, the income from the provision of services taxable in Belgium will be limited to the net amount so obtained. This is true for resident as well as for non-resident service providers.

A BE or PE will thus be taxable in Belgium on the difference between the income actually realized and the tax deductible costs actually incurred in the hands of the BE (or PE) as determined from the separate set of accounts of the BE (or PE).[46]

1.4.2. Lump-sum taxation

Should no separate set of accounts be kept, the taxable basis in the hands of the BE or PE will in principle be determined on the basis of a lump-sum amount. As a result, the yearly taxable basis will be determined on 10 per cent of the gross turnover realized in Belgium with a minimum of 7,000 euro per employee and an absolute minimum of 19,000 euro.[47] The European Court of Justice has ruled that this minimum taxable basis is in violation of the freedom of establishment.[48] It is sometimes still applied, though. In a number of cases such determination of the taxable basis is formalized in a written agreement with the local Belgian tax inspector without, however, deviating from the domestic tax law criteria mentioned.

1.4.3.Taxation by way of withholding

Obviously, a particular issue may arise for income realized in Belgium without a BE. As mentioned, such income includes profits derived from activities performed in Belgium by foreign insurance companies (excluding reinsurance activities) as well as profits derived through an activity as director, liquidator or similar in a Belgian company. For those categories of income, the taxation is imposed by way of withholding tax.[49]

45 230/26.1 commentary to the BITC.
46 Art. 235 BITC.
47 Art. 182, §1, 3(a) RD/BITC.
48 European Court of Justice, 22 March 2007, Case C-383/05, *Talotta.*
49 Art. 87, 5(c) and (e) RD/BITC.

Also income from non-resident artistes and athletes taxable in Belgium is taxed by way of withholding on the gross amount less a limited lump-sum cost deduction.[50]

A final relevant category of income the tax on which is levied through withholding is the income categorized as miscellaneous income.[51]

1.4.4. Fees for technical services

Fees for technical services are not treated as a different category of income. Those fees are subject to taxation according to the general rules explained above.

1.5. Compliance and administration

As mentioned above, only in limited circumstances will a non-resident SP without a BE (or PE) be subject to taxation in Belgium on profits realized in Belgium. Such income includes:

- income from insurance activities;
- income from an activity as director, liquidator or similar in a Belgian company;
- income from non-resident artistes and athletes;
- miscellaneous income.

For those categories of income, the taxation is imposed by way of withholding tax.

A non-resident SP deriving services income through a BE (or PE) is obliged to file an annual non-resident income tax return.

As a general rule, and if the non-resident is a foreign corporation, the annual income tax return cannot be filed less than one month from the date when the (foreign) annual accounts have been approved and no later than six months after the end of the period to which the tax return refers. For instance, assuming that the accounting year has been closed on 31 December 2010, the non-resident tax return needs to be filed in principle by 30 June 2011 at the latest. However, often a later date is mentioned on the tax return form sent by the authorities. Such a date mentioned on the tax return form overrules the above six-month rule and has become a fixed practice.[52] Often, non-resident tax returns are not due before September or even November of the year following the year to which the income relates.

BEs (or PEs) are taxable on their net income as determined from a separate set of accounts of the BE (or PE). If no legal branch is deemed to exist in Belgium, no legal requirements exist to keep a separate set of accounts in the hands of the BE (or PE). However, in such a case, an issue of proof of the taxable basis occurs, in the absence of which the taxable basis is determined based on a lump sum.

It is worth mentioning the separate reporting requirement for certain types of expenses incurred by both residents and non-residents. Expenses consisting of:

- commission, brokerage, trade or other rebates, occasional or non-occasional fees, bonuses, or benefits in kind forming professional income for the beneficiaries;

[50] Art. 87, 5(d) RD/BITC.
[51] Art. 87, 5(a) RD/BITC.
[52] Arts. 305 *et seq.* BITC.

- remuneration or similar indemnities paid to personnel members or former personnel members of the paying company;
- lump-sum allowances granted to personnel members in order to cover costs proper to the paying entity;

have to be reported timely on special forms 281.XX[53] in an electronic way. In the absence of such timely reporting, a special assessment of 309 per cent is applicable ("secret commissions tax") unless the payer can demonstrate that the payments have been reported in the beneficiary's Belgian tax return. The special assessment of 309 per cent and the expenses themselves are, however, fully deductible for residents or non-residents taxation.

Finally, reference should be made to the special form to be attached to the (non-resident) corporate income tax return for payments made to recipients established in tax havens.

2. Treaty issues[54]

2.1. Income from services under article 7

The treaty policy carried on by Belgium is reflected in the Belgian model tax convention of June 2010.[55] Under that model the general rule with respect to the taxation of income from services is similar to the general rule under articles 5 and 7 of the OECD model.

In particular, the Belgian model follows the PE definition found in paragraphs 1 and 2 of article 5 of the OECD model. It includes neither a specific service PE provision in article 5 – deeming a PE to exist where one would not otherwise exist under paragraphs 1 and 2 – nor a separate article dealing with independent personal services.

Belgium shares the view that an enterprise of one state should be taxable in another state only if it can be regarded as participating actively in the economic life of that other state. As long as an enterprise does not perform services through a fixed place of business situated in another state, it cannot be regarded as participating actively in the economy of that other state and income from services should not be taxable therein. Furthermore, the taxation in the other state of income not attributable to a fixed place of business raises compliance and administrative difficulties justifying exclusive residence taxation.

Belgium, however, concludes treaties that deviate from the principle of exclusive residence taxation of services that are not attributable to a PE. Treaties with developing countries or countries in transition often contain provisions that deem

53 The numbering of the forms depends on the nature of the payment and is composed of two additional digits.

54 An administrative commentary used to provide guidance on the interpretation of treaty provisions. It is obsolete and no longer available. The BTA relies on the OECD commentary as amended from time to time (Administrative circular AAF/2004/0053 (AAF 5/2004), 16 January 2004) and, when appropriate, on the UN commentary. This report takes into account the positions taken by the Belgian competent authority for treaty purposes in individual cases.

55 http://fiscus.fgov.be/interfafznl/fr/international/conventions/index.htm.

the furnishing of services to constitute a PE in certain circumstances (19 out of 84 treaties in force with 91 jurisdictions) and/or an article 14 along the lines of article 14 of the UN model.

Some Belgian treaties follow article 5(3)(b) of the UN model without any deviation.[56] With some countries the six-month threshold has, however, been either reduced[57] or extended.[58] Most treaties include the requirement that the services be "for the same or a connected project".[59] Belgium indeed considers that it is not appropriate to add together unrelated projects that do not constitute a coherent commercial whole in order to determine whether the activities in another state reach the provided time threshold. To determine whether services are for the same or connected projects, the BTA refers to the OECD commentary on the alternative service PE provision, which includes the same rule.[60] It generally considers that projects are connected where they are carried out by an enterprise for a person or for related persons and the nature of the work involved under the different projects is similar.

To prevent misuse of article 5(3)(b), the treaty with Chile provides that the duration of the services performed by associated enterprises shall be taken into account together in determining the duration of the performance of services by an enterprise. The fact that an enterprise divides a contract into several parts, each covering a period less than the provided time threshold, and attributes parts of the contract to different companies belonging to the same group, may also constitute an abuse falling under the application of anti-avoidance rules found in domestic law.[61] The BTA has proposed to introduce in Belgium's domestic law a provision dealing with such misuse.

As of 2008, where a service PE provision is discussed during treaty negotiations, Belgium gives preference to the alternative provision added to the OECD commentary on article 5. That provision gives more certainty. It encompasses individual personal services, it is clearly limited to services performed in another state through individuals present in that state, it avoids a different treatment of services performed by an individual and services performed by a one-man company, and its interpretation is clarified in the OECD commentary. As a second choice, Belgium will favour the UN alternative provision which countries may agree on where they want to delete article 14 on independent personal services.[62] This alternative provision will eliminate the difficulties relating to the diverging views contracting states may have with respect to the scope of article 14.

Services PE provisions generally include the following limitations. Income from services performed outside Belgium is not taxable. The BTA considers that the terms "if activities of that nature continue … within a Contracting State" indicate that a PE exists only where employees or other personnel perform activities

56 Argentina, China, Chinese Taipei, Egypt, Senegal, Singapore, Sri Lanka, Vietnam.
57 Indonesia, Pakistan, Rwanda (3 months), Morocco (75 days).
58 Albania, Czech Republic (9 months), Kazakhstan, the United Arab Emirates (12 months).
59 Chile, Czech Republic, Hong Kong, the Philippines.
60 OECD commentary, art. 5, paras. 42.40 and 42.41.
61 OECD commentary, art. 5, paras. 18 and 42.45, which is used *mutatis mutandis* to interpret art. 5(3)(b) of the UN model.
62 Revised UN commentary, art. 5, para. 15.5 to 15.10.

within Belgium and that only the profits attributable to the performance of such activities may be taxed in Belgium.[63]

Those provisions apply only to services provided to third parties (see section 2.2.2).

The same limitations apply to services performed by enterprises carried on by self-employed individuals and by other enterprises (a minimum time threshold during which the activities are performed "through employees or other personnel"). Services performed personally by a self-employed individual are therefore not covered. Those activities may constitute activities of an independent character dealt with under article 14.

As the service PE provisions apply only to services provided by the enterprise to third parties while article 5(4) covers preparatory and auxiliary activities generally provided to the enterprise itself, article 5(4) is generally not relevant to a service PE. As paragraphs (d) to (f) of article 5(4) deal with exceptions relating to "the maintenance of a fixed place of business", the BTA considers in any case that they are not applicable to a service PE.

Income derived from the performance of services is attributable to a deemed PE and taxable pursuant to article 7. All relevant (direct or indirect) expenses relating to such performance are taken into account when determining the profits attributable to the deemed PE.

Business profits are taxable under Belgian law only where they are attributable to a BE. Consequently, where a services PE provision allows Belgium to tax business profits, those profits are not always taxable under domestic law. In order to avoid any gap between treaty provisions and domestic law, the BTA has proposed to amend the domestic law so that, where a treaty deems a PE to exist, that PE will constitute a BE and income attributable to it will be taxable under domestic law.

The services PE provision applies notwithstanding the construction site provision (even if not expressly mentioned in the services PE provision). In most cases, to ensure greater consistency, the time threshold provided in respect of construction activities is the same as that provided in the services PE provision. A few treaties, however, provide for a shorter time threshold in the services PE provision.[64] The fact that an enterprise may have a services PE when the locations where services are performed do not constitute PEs pursuant to the construction site provision is consistent with the aim of the services PE provision, i.e. departing from the condition of fixity.

In accordance with paragraph 17 of the OECD commentary on article 5, the BTA considers that planning and supervisory activities are covered by article 5(3) of the OECD model if carried out on the site by the building contractor or another enterprise involved or not in the construction work.[65] Belgium has, however, agreed to expressly include supervisory activities in almost half of its treaties.

63 Expressly confirmed in the treaty with Chinese taipei.

64 Indonesia, Morocco, Pakistan, Rwanda, Singapore, the Czech Republic.

65 The 2003 update of the OECD model has deleted the preceding restrictions and Belgium has made no observation on the new para. 17. Uncertainty exists, however, as to how Belgian courts will deal with that change of position. In 2005 the Ruling Commission still referred to the previous interpretation found in the old administrative commentary (no. 500-063, 7 October 2005).

No other provision deals with the furnishing of services generally. In particular, income from services is not characterized under Belgian law as income, other than income from business or independent personal services, to which article 21 (other income) would apply. Were income from services to be characterized as such under Belgian law, the BTA would take the view that the context of article 7 requires such income to be considered as profits of an enterprise derived from the carrying on of business to which article 7 applies (except where article 14 is applicable). Consequently, Belgium's position is that, where article 21(3) of the UN model is included in a treaty, income from the furnishing of services should not be taxable in the contracting state where it arises according to that provision.

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. Some other treaties expressly subject the application of that provision to the evidence that the similar activities carried on in the state where a PE is situated were structured in a manner intended to avoid taxation in that state[66] or to the fact that the transactions are connected with the PE[67] or occur regularly.[68]

2.1.1. Other activities

A few treaties contain provisions according to which the use or presence of substantial equipment for a certain period of time is deemed to constitute a PE in the state in which such equipment is situated.[69]

An offshore article is included in treaties with states that want to safeguard their taxing rights with respect to income derived from natural resources.[70] As a matter of principle, Belgium, however, considers that there are no good reasons in those cases to depart from the principle of exclusive residence taxation of services which are not performed through a fixed place of business.

Belgium is reluctant to include an article providing for specific rules with regard to the taxation of income from technical services but has agreed to do so in some treaties.

2.2. Income from services treated as royalties

2.2.1. Supply of knowhow

No type of payment identified as being a payment for the provision of services in paragraphs 11 to 11.6 of the commentary on article 12 of the OECD model is considered by Belgium to be royalties under that article. In an attempt to clarify this, some treaties provide that payments for technical services shall not be considered to be payments for information concerning industrial, commercial or scientific

66 Estonia, Latvia, Lithuania, Kazakhstan, Turkey, Uzbekistan.

67 Indonesia, Pakistan, the Philippines.

68 The Philippines.

69 Equipment used in relation to natural resources for more than 12 months (Australia and Kazakhstan); equipment used for more than 12 months (New Zealand).

70 Denmark, Latvia, Lithuania, the Netherlands and Norway (activities exceeding 30 days); United Kingdom (no time threshold).

experience, but shall be taxable in accordance with the provisions of article 7 or article 14, as the case may be.[71] Those treaties, however, contain no clear guidelines in order to determine whether a payment is in consideration for technical services or for "knowhow". In this respect, the treaties with Estonia, Latvia and Lithuania are clearer. They state that the terms "information concerning industrial, commercial or scientific experience" are to be interpreted according to the OECD commentary.

Belgium is reluctant to adapt the definition of "royalties" to include payments for technical services. It has, however, agreed to do so in a few treaties. This is the case with Argentina, Brazil, Morocco[72] and Tunisia.[73] The terms "technical services" or "technical assistance" are not defined in those treaties or under domestic law (see section 2.3).

Article 12 of the treaties with Australia, Bulgaria and Portugal covers payments for assistance related to the use of rights, property or information mentioned in the definition of "royalties". Although those provisions are worded differently, the BTA interprets all three treaties as covering assistance of an ancillary nature enabling the use of rights, property or information mentioned in the definition.

The payments are treated as royalties having their source in the state of residence of the payer or, where the payments are connected with, and borne by, a PE or fixed base, in the state where the PE or fixed base is situated. They may be taxed at source on their gross amount at a limited rate of 5 per cent, 10 per cent or 11 per cent, as the case may be.

The BTA has proposed to modify domestic law to enable Belgium to tax income from services not performed in Belgium (see section 2.3).

2.2.2. Secondment of employees

Rather than transferring knowhow or providing services to another enterprise directly, an enterprise may second one of its employees to the other enterprise for the purpose of indirectly providing expert skills to that other enterprise.

Where ForCo, a foreign enterprise, temporarily seconds a skilled manager to its Belgian SubCo for the purpose of assisting SubCo to put in place new management processes and train SubCo employees, the fee paid by SubCo to ForCo would, generally, not be characterized in Belgium as a royalty even if knowhow developed by ForCo may indirectly be transferred to SubCo through the work performed by the secondee. That payment would be characterized as a service fee. Where a contract clearly covers, however, the provision of services as well as the transfer of special knowledge, skill or expertise (e.g. the contract include provisions concerning the confidentiality of such information), the rules applicable to a mixed contract would apply.[74]

Whether ForCo would be regarded as having a PE in Belgium by reason of the work performed by the secondee for SubCo would depend on the facts and

71 Albania, Armenia, Azerbaijan, Belarus, Canada, Ecuador, Kazakhstan, Mexico, New Zealand, Poland, Sri Lanka, Turkey, the United Arab Emirates, Uzbekistan, Venezuela, Vietnam.

72 Services performed within the state of source and not constituting a PE.

73 Assistance performed within the state of source.

74 OECD commentary, art. 12, para. 11.6.

circumstances of the case. Where the work performed by the secondee clearly belonged to the business of SubCo, ForCo could not be regarded as having a PE in Belgium. In accordance with paragraphs 8.12 to 8.15 of the OECD commentary on article 15 (Income from employment), the BTA considers that the secondee is in an employment relationship with SubCo and is performing the business of SubCo when he works under the authority and supervision of SubCo.

On the other hand, where the secondee performs ForCo's own business activities under the control and responsibility of ForCo for the benefit of SubCo, ForCo would be regarded as having a PE in Belgium by reason of the services performed through the secondee if the other conditions provided for under article 5 were fulfilled.

That latter case should be distinguished from cases where an employee of ForCo is present in the premises of SubCo in order to ensure that SubCo complies with its obligations towards ForCo. In such cases, the employee is carrying on ForCo's business (article 5(1) and (4) may apply)[75] but ForCo is not providing services to SubCo through the employee (a service PE provision will not apply).[76]

2.3. Fees for technical and other services

Specific provisions dealing with technical fees are not commonly found in Belgian treaties. The treaties with Ghana, India[77] and Rwanda provide for taxation of fees for services of a technical, managerial or consultancy nature in the state of the payer at a limited rate of 10 per cent of their gross amount. The treaty with Romania provides for taxation of payments for intermediary services in the state of the payer at a limited rate of 5 per cent of their gross amount.

The terms "services of a technical, managerial or consultancy nature" are not defined in those treaties or under domestic law. The BTA refers to section 5 of the OECD report on treaty characterization issues arising from e-commerce for interpreting those terms as follows:

- technical services: services requiring, when provided to the customers, the operation of special skills or knowledge related to a technical field (services in the fields of arts or human sciences are excluded);
- managerial services: services relating to the management of an enterprise (e.g. human resources management, operations management, organizational development) in order to achieve business goals;
- consultancy services: provision of advice by professionals having special qualifications, such as accountants, lawyers, engineers or psychologists.

The provisions included in the treaty with Rwanda allow the state of the payer to tax only technical fees derived from activities exercised in that state. The taxation at the rate of 10 per cent will, however, not apply where the activities are carried on through a PE. Where the activities are not carried on through a PE, the beneficial owner may, nevertheless, choose to be taxed as if it the activities were carried on in that way.

75 OECD commentary, art. 5, para. 4.3.

76 OECD commentary, art. 5, para. 42.30, which is used *mutatis mutandis* to interpret art. 5(3)(b) of the UN Model.

77 Specific provisions included in art. 12 provide for a limited rate of 20 per cent, reduced to 10 per cent by application of a most favoured nation clause.

The provisions included in the treaties with Ghana, India and Romania deem the fees for services to arise in the state of which the payer is a resident or in which the PE that bears the expense is situated. Those provisions will not apply where the provisions of article 7 or article 14 are applicable.

Belgium does not favour taxation in the state of source of income from services that are not performed in that state or the taxation of such income on a gross amount. Gross taxation may be arbitrary and too high (especially where the SP subcontracts part of the contract). The net margins differ greatly depending on the business sectors and circumstances; it is therefore difficult to set an appropriate rate of taxation on gross income. This policy is reflected in domestic law, payments for services being only taxable on a net basis and if the services are performed in Belgium.

The BTA, however, considers that when Belgium must depart from its policy in a treaty, it should be able to levy the withholding tax provided for in that treaty on the payments for services not performed in Belgium. The BTA has consequently proposed to modify domestic law so that the withholding tax provided for in a treaty will be due under domestic law.

2.4. Independent personal services

The Belgian model does not include specific provisions dealing with independent personal services. Most treaties, however, contain such provisions. Among those treaties, 33 provide for a presence test (generally a 183-day presence test;[78] in a few cases, a shorter test).[79] The treaty with Pakistan provides for a revenue threshold.

2.4.1. Application to companies

The BTA considers that article 14 is not applicable to companies. It relies on the following:

- the title of the article limits the scope to personal services;
- according to paragraph 4 of the UN commentary, the satisfaction of any of the criteria found in article 14(1) of the UN model would give the source state the right to tax the income derived from the performance of "personal activities" by "an individual".

Article 14(1)(b) added under the UN model deals with income derived by a resident of a state if "his stay" in the other state exceeds 183 days; in that case, the income derived from "his activities" performed in that other state may be taxed in that other state. This provision refers only to the activities performed by the resident himself and not to activities performed through other individuals (employees or other personnel).[80] As companies may only act through directors, employees or other agents, article 14(1)(b) cannot apply to them.

78 Albania, Algeria, Azerbaijan, Bangladesh, China, Chile, Chinese Taipei, the Czech Republic, Estonia, Ghana, India, Israel, Ivory Coast, Kazakhstan, Latvia, Lithuania, Morocco, Mexico, Mongolia, Norway, New Zealand, Pakistan, South Korea, Singapore, Sri Lanka, Thailand, Tunisia, Vietnam, Yugoslavia.

79 Argentina, Indonesia (90 days), Egypt, the Philippines (120 days).

80 UN commentary, art. 14, para. 9.

Applying specific provisions to income that companies derive from "activities of an independent character" is not justified and could raise difficulties. The meaning of those terms is indeed far from clear.

2.4.2. Application to transparent entities

Under domestic law, the activities carried on through a transparent entity (without legal personality) by different partners are deemed to be personally performed by each partner sharing the profits of that entity. The BTA applies that deeming rule *mutatis mutandis* to activities carried on through partnerships with legal personality that are treated as fiscally transparent under the domestic law of the other contracting state.[81]

If the entity performs services through a fixed base situated in Belgium, each individual partner will be deemed to have a fixed base in Belgium for the taxation of his share of the income derived from the services performed through the fixed base, regardless of whether or not he has personally performed any of those services. This is consistent with paragraph 44 of the OECD report on issues related to article 14.

Where article 14(1)(b) applies, that fiction is similarly applicable. If the period of time spent in Belgium by the different individual partners exceeds the time threshold under article 14(1)(b), each individual partner will be taxable in Belgium on his share of the income derived from the services performed in Belgium through the entity.

2.4.3. Activities covered

Article 14 applies to income dealt with under article 27 of the ITC (income from professional services, duties or offices and from other profit-making activities not considered as business profits or remuneration under domestic law).[82]

2.4.4. The term "fixed base"

The BTA considers that the term "fixed base regularly available to him" has the same meaning as "fixed place of business" used in article 5(1).[83] It has abandoned its preceding interpretation under which the term "fixed base" would have the same meaning as "fixed place" used under domestic law to determine the existence of a BE. Under domestic law, the concept of BE is indeed no longer applicable to income from independent personal services.

Following the Court of Appeal of Ghent,[84] the concept of fixed base is wider than the concept of PE. In that case, a consultant/trainer had been performing

81 OECD commentary, art. 4, para. 8.8. Several decisions issued by the Belgian Ruling Commission (e.g. Decision 900.421, 9 March 2010).

82 Supreme Court, 3 October 2003, http://jure.juridat.just.fgov.be/?lang=fr.

83 Confirmed by Antwerp, 13 May 2008, http://fiscus.fgov.be/interfafznl/fr/ international/conventions/databank_juris.htm. According to the BTA, the court has, however, made a wrong interpretation of the PE concept by requiring an exclusive right to use the premises for carrying on the activities (OECD commentary, art. 5, para. 4).

84 Ghent, 20 October 2009, http://fiscus.fgov.be/interfafznl/fr/international/conventions/databank_juris.htm.

preparatory work at home (in the absence of any other location where such work could be performed) for a period of two years. The decision does not explain in which respect the concept of fixed base is larger. It is, however, likely that the court considered that the activities performed at home were preparatory activities and intended to confirm that article 5(4) was not applicable in the context of article 14.

2.4.5. Income attributable

All income derived from the activities carried on through a fixed base situated in Belgium, including the provision of services outside Belgium, is attributable to that fixed base. Where, however, services are wholly or partly performed outside Belgium, the income attributable to this performance will not be attributable to the fixed base.

2.4.6. Taxation on a net basis

Under domestic law income from independent personal services is taxed on a net basis.

2.4.7. Variations

At the request of some treaty partners, Belgium has agreed to modify article 14 to limit its scope expressly to individuals. At present, when article 14 is maintained, Belgium systematically proposes such clarification to avoid any divergence of interpretation with respect to the scope of that article, especially where a presence test is included.

In the treaties with Estonia, Latvia and Lithuania, an individual whose stay in Belgium exceeds the time threshold is deemed to have a fixed base in Belgium. This deeming rule has no implication for the taxation of the individual in Belgium. Indeed, under domestic law the concept of fixed base does not exist with respect to independent personal services. Those services are taxable on a net basis when performed in Belgium.

The treaties with South Korea and Thailand deal with independent and dependent personal services under a single article, which provides for the rules applicable under article 15 (income from employment). Services performed in Belgium are taxable in Belgium except where the so-called 183-days rule applies.