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Branch Reporter
Koen Morbée*

1. Tax treaty policy in Belgium

Belgium generally follows the OECD model as a basis for treaty negotiations and has a clear preference for the exemption with progression method. Belgium only uses the credit method for interest and royalty income which according to articles 11 and 12 may also be subjected to a limited tax in the source State (so-called QFIE method provided for in article 285 ITC).

Most DTCs signed by Belgium do not provide for subject-to-tax clauses. Such provisions are rather exceptional and only appear in a limited number of treaties. The author has no knowledge of a model subject-to-tax provision the Belgian authorities use when negotiating DTCs. However, the wording of such subject-to-tax provisions is mostly the same. Either the terms “income which has been taxed”, or the terms “items of income which are taxed” are used. The Belgian tax authorities rather put forward that subject-to-tax provisions are only inserted by Belgium in DTCs in order to achieve reciprocity, e.g. in DTCs with countries that apply the credit method. Since such countries only grant a tax credit for Belgian taxes that are effectively paid, Belgium for its part only exempts foreign income which has (effectively) been taxed in the other state.

However, Belgium tries to insert more and more subject-to-tax provisions in DTCs even with countries which do not use the credit method.[1] In this respect the reservation Belgium made on article 21 at the occasion of the 1997 update of the OECD model is important as it indicates this trend in Belgian treaty policy. In order to avoid double non-taxation, Belgium reserves the right to tax Belgian-source income where the state of residence does not effectively exercise that right.[2] Belgium has already signed several DTCs in which the scope of article 21 is limited to items of income which are taxed in the state of residence (see below).

* Advocate, Tiberghien Advocaten; the author would like to thank especially his colleague Sofie Van Breedam for her assistance; special thanks also go to his colleague Caroline Docclo for her very helpful comments

1 E.g. art. 23 DTC with the Netherlands. Belgium only grants relief if the income is taxed in the Netherlands. Conversely, the Netherlands grant relief if the income may be taxed in Belgium.

2 OECD Commentary, 21/16.

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2. Belgian internal law

We will first comment on Belgian internal law as the interpretation given by case law to some domestic law provisions is highly relevant when interpreting DTCs signed by Belgium.

2.1. Article 156 ITC

Article 156 ITC provides for a unilateral relief[3] in order to reduce the effect of double taxation.[4] For some items of income the relief is subject to two conditions of which the second is highly relevant when reporting on double non-taxation in Belgium. The relief is granted provided the income has been (a) earned and (b) taxed abroad.

With respect to the second condition two important questions arise. The first question relates to the interpretation of the words "taxed abroad" used in the ITC. The second question is whether such interpretation has any influence when interpreting a DTC signed by Belgium.

2.1.1. Taxed abroad

In the *Sidro* case, the facts of which date back to 1960, the Court of Cassation[5] had to decide on the meaning of the words "taxed abroad" mentioned in the old coordinated tax laws of 1948 (the same wording is still used in article 156 of the current ITC). The case involved a Belgian company that realised a capital gain on shares held in a Canadian subsidiary. The gain was not taxed in Canada since at that time Canadian law did not provide for a taxation of capital gains. The Belgian company was of the opinion that both conditions (earned and taxed abroad) for claiming relief in Belgium were met. According to the Court of Appeal,[6] however, foreign income which is exempted in the source state may not be considered as taxed abroad in the sense of the Belgian statute.

In its landmark judgment of 15 September 1970 the Court of Cassation overruled the decision of the Court of Appeal. The Court of Cassation ruled that with respect to the second condition (taxed abroad) Belgian law provides for the relief regardless of the nature, the form or the amount of the foreign tax. Consequently, according to the Court of Cassation, income must be considered as being taxed abroad in the sense of (the) statute if the income has been subjected to a tax regime in the source state. The Court of Cassation then specified that the Court of Appeal could not refuse the domestic relief on the mere fact that the gain was not taxed in Canada without verifying whether the gain was subjected to a tax regime

3 See also the Belgian report of F. Vanistendael on unilateral measures to prevent double taxation in *Cahiers de Droit Fiscal International*, 1981, 211.

4 As from tax year 2004 no unilateral relief is granted any longer to domestic companies.

5 Court of Cassation (hereafter Cass.), 15 September 1970, *Pas.*, 1971, I, 37.

6 Brussels, 28 May 1969, *Rev.Fisc.*, 1970, 81.

in Canada and whether non-taxation in Canada resulted from the application of the Canadian tax regime.

Since this important judgment of the Court of Cassation it has been generally accepted in Belgium that income must be considered as being taxed abroad from the moment this income has been subjected to its proper tax regime in the source State, even if the income is exempted according to the domestic regime of that state. Also the Belgian tax authorities agree with this interpretation. The *Sidro* principle is generally referred to in Belgium with the maxim *exemption vaut impôt*. However, it is also accepted that this maxim is not a general principle of law.[7]

2.1.2. Non-taxable versus exempted income

In a reply to a question in Parliament the Minister of Finance seems to indicate that apart from exempted income also foreign income which is non-taxable in the source state should be considered as being taxed abroad.[8] However, there is a clear difference between non-taxable income and tax-exempted income. Non-taxable income is not implied by any tax law and thus falls outside the scope of a tax regime, whereas exempted income is in principle taxable but escapes taxation because a particular provision exempts that income from tax.[9]

Hence, according to the *Sidro* ruling, income is only taxed if it has been subjected to its proper tax regime. Since non-taxable income is precisely not taxable because there is no tax regime, it can never be deemed to be subjected to a tax regime. Consequently it can never be deemed to be taxed. Conversely, exempted income has been subjected to a tax regime and must be considered as taxed income.

The question now arises whether the *Sidro* principle is applicable when interpreting DTCs. A distinction should be made between DTCs which follow the OECD model and those providing a subject-to-tax clause.

2.1.3. Treaties which follow the OECD model

If the DTC follows article 23A of the model, Belgium must exempt the income if the income may be taxed in the other state. Apart from the progression the obligation for Belgium to exempt is not subject to any other condition. It is therefore generally accepted that Belgium has to exempt the income regardless of whether the income is actually taxed in the source state.[10] The Court of Cassation confirms this interpretation.[11]

Whereas for the application of article 156 ITC (see above) the Court of Cassation obliges the Courts of Appeal to verify whether the income has been subjected to a tax regime in the source state, the Court of Cassation does not require

7 Th. Afschrift, “Exemption vaut impôt, principe général de droit en matière d’impôts sur les revenus?”, JDF, 1980, 68, 31.

8 Question no. 70 of 21 December 1998, Senate, session 1988–1989, no. 19, 913.

9 Opinion Proc. Gen. Hayoit de Termicourt to Cass., 27 May 1946, JPDF, 1946, 208.

10 E.g. Brussels, 28 November 1997, JDF, 1998, 297.

11 Cass., 26 April 2001, www.cassatie.be.

this test if Belgium has to exempt the income on the basis of a DTC that follows the OECD model. Thus for the exemption in Belgium the tax treatment of the income in the other state is of no importance at all. Basically the *Sidro* principle has nothing to do whatsoever with DTCs which follow the OECD model. As a consequence, in our opinion the difference between non-taxable income and tax-exempt income is irrelevant for this kind of treaties.

We conclude that if a DTC (following the OECD model) applies, Belgium must exempt the income, irrespective of whether the income is actually taxed in the source state and irrespective of the fact that non-taxation in the source state results from a domestic exemption or of the fact that the income is non-taxable in the source state in the sense described above.

2.1.4.Treaties providing a subject-to-tax clause

On the question whether the *Sidro* principle affects treaties containing a subject-to-tax clause (cf. are taxed) Belgian scholars adopt different views.

According to most scholars[12] the *Sidro* principle applies. Apparently the tax authorities share this view.[13] According to this opinion income is thus deemed to be taxed in the source state in the sense of a subject-to-tax clause if it was subjected to a tax regime there, even if the domestic regime provided for an exemption. This interpretation is supported by a judgment of the Liège Court of Appeal of 4 October 2000 which we will discuss below.

Other scholars[14] argue that the *Sidro* principle cannot apply in such cases. Otherwise there would be no distinction between DTCs which follow the OECD model and those explicitly providing for a subject-to-tax clause because Belgium would exempt the income in both cases, even if because of a domestic exemption the income was not taxed in the source state: (a) for DTCs following the model because the exemption is according to treaty law not subject to any condition and (b) for DTCs providing a subject-to-tax clause because income which benefits from an exemption in the source state should according to the *Sidro* principle be considered as taxed income.

Support for this second opinion can be found in a judgment of the Brussels Court of Appeal of 8 March 1988.[15] A Belgian resident employee who was working in Belgium for an American company was sent to the United States for training for 18 months. Although according to article 15, paragraph 2a of the DTC the US had the right to tax, the salary was not taxed there. The reason for non-taxation in the US does not appear from the judgment and thus apparently was irrelevant to the Court. The Court merely states that according to article 23 of the DTC Belgium should only exempt income that was taxed in the US. Since the salary was not taxed there, Belgium therefore had the right to tax. The taxpayer also

12 E. Schoonvliet, *Manual*, 1996, 241; R. Van den Eeckhaut, TFR, 1999, 283; W. Heyvaert, *Het nieuwe Belgisch-Nederlands dubbelbelastingverdrag,* (ed.) B. Peeters, Ghent, Larcier, 2001, 513.

13 Commentary on DTCs, 23/112.

14 L. De Broe, *Fisk.Int.*, 1988, no. 56, 7–8.

15 Brussels, 8 March 1988, FJF, 88/113.

referred to the *Sidro* principle. The Court replied, however, that in Belgium there is no general principle of law according to which exemption would equal taxation and adds that even if the income would be exempt in the United States according to domestic law, Belgium would still have the right to tax.

Together with most scholars we believe that there is no reason that the *Sidro* principle should not apply when interpreting subject-to-tax provisions in Belgium. However, we also believe that one should account for the following observations when applying this principle in treaty situations.

2.1.4.1. Exempted versus non-taxable income

Whereas the distinction between non-taxable income and tax-exempted income is of no importance when interpreting a DTC which follows the OECD model, this is different for DTCs providing a subject-to-tax clause. Non-taxable income can never be considered as taxed because such income is not subject to a tax regime. The same reasoning should be followed when interpreting a subject-to-tax clause provided for in a DTC.

Thus, if article 23 of the DTC provides for a subject-to-tax clause Belgium has to exempt the income if it was subjected to a tax regime in the other state, even if this domestic regime provides for a partial or complete exemption. On the other hand Belgium should not exempt income that is non-taxable in the other state, i.e. income which falls outside the scope of the domestic tax regime of the source state. This is exactly the difference with DTCs which follow the OECD model since under those DTCs Belgium also has to exempt income that is non-taxable in the other state.

2.1.4.2. Subject-to-tax condition

Income which is not subjected to a tax regime does not meet the requirements of the *Sidro* principle and therefore cannot be considered as taxed income. This is especially so in case of fraud, since the purpose of fraud is to escape a tax regime.

However, income can also stay outside the scope of a tax regime for more legitimate reasons. A striking example hereof is the judgment of the Liège Court of Appeal of 4 October 2000.[16] A teacher appointed in Belgium taught in the United States for two years. The US exempted his US income on the basis of article 20 DTC. The taxpayer referred to the *Sidro* principle and argued that also a treaty exemption, e.g. article 20, implies that the income is deemed to be subjected to its tax regime and that Belgium should consequently exempt the income, in spite of the subject-to-tax clause provided for in the DTC with the US. The court did not agree with the taxpayer's point of view. The court ruled that the purpose of the subject-to-tax clause is to exempt income that is effectively taxed or exempted in the source state according to the internal law of the source state, irrespective of treaty rules. The court herewith confirms that the *Sidro* principle

[16] Liège, 4 October 2000, JDF, 2001, 52, commented on by J. Malherbe; J. Baeten, *Act.Fisc.*, 2001, 3/1; M. Wauman, *Fisc.Int.*, 2000, no. 205, 5.

also applies in case the DTC provides for a subject-to-tax clause. However, the court also immediately defines the limits of this principle in treaty situations. The exemption must result from the domestic law of the source state and not from treaty provisions. Indeed, a DTC neither imposes taxes, nor grants exemptions. Thus a state which has no right to tax according to a DTC does not grant an exemption in the sense of the maxim *exemption vaut impôt*.

2.1.4.3. Form and nature of the foreign tax

A third observation regards the form and the nature of the foreign tax. Whereas article 156 ITC does not set any condition at all as far as the nature or the form of the foreign tax is concerned, this is different in a treaty situation. Indeed, a DTC only applies to those taxes which are listed in article 2. Thus, if a DTC provides for a subject-to-tax clause, Belgium should only exempt foreign income if the income was subjected to one of the tax regimes mentioned in article 2 (even if this tax regime provides for an exemption).

2.1.4.4. Amount of the foreign tax

As a rule subject-to-tax clauses do not set any condition as far as the amount of the foreign tax is concerned. As an exception article 23 of the DTC with Mauritius provides that Belgium only has to exempt Mauritius source permanent establishment profits if these profits were taxed in Mauritius at a rate of 25 per cent.

2.1.4.5. Treaty interpretation

The last and probably most important observation regards treaty interpretation. The Court of Cassation already decided innumerable times that a treaty is not open to unilateral interpretation by one of the contracting states. Courts thus must interpret DTCs in accordance with the common intention of the contracting parties.[17]

According to treaty law a subject-to-tax clause can thus only be interpreted in the sense of the *Sidro* principle if such interpretation is in accordance with the intention of the contracting states.

An example hereof is the (new) DTC with the Netherlands (2001). According to article 21, §1 of this convention other items of income are only taxable in the State of residence if these items of income are taxed in the state of residence. In a joint commentary to the convention the Belgian and Dutch tax authorities explain[18] that an item of income is taxed if it is actually included in the tax base upon which taxes are levied, that is to say without any objective exemption being granted subsequently on the basis of domestic law. The contracting parties were

17 Cass., 27 January 1977, *Pas.*, 1977, I, 574; Cass., 12 March 1968, *Pas.*, 1968, I, 875; Cass., 16 January 1968, *Pas.*, 1968, I, 625; B. Peeters, in *Cahiers de Droit Fiscal International*, 1993, Belgian report, 229.

18 Joint commentary, Circ. AFZ/2002-0097 (AFZ 5/2003), 14 March 2003.

thus quite consciously objective about the *Sidro* principle. For the application of the new DTC with the Netherlands exempted income can therefore by no means be deemed to be taxed income in the sense of the subject-to-tax clause.

2.2. Other domestic provisions

Although there is no general matching principle in Belgium according to which expenses would only be tax deductible to the extent that the corresponding profits were actually taxed or vice versa, the idea is used in some domestic provisions in order to avoid double (non) taxation.

2.2.1. Article 26 ITC

In principle a Belgian company is only taxable on profits it actually realised. As an exception to this rule article 26 ITC provides that a company is also taxable on abnormal or gratuitous advantages granted to any third party.

In some cases, however, and in order to avoid double taxation, no taxation occurs if the advantage is included in the taxable base of the beneficiary. According to case law this condition does not require that the beneficiary be effectively taxed on the advantage.[19] Nevertheless the company will have to prove that the advantage was effectively considered when determining the taxable base of the beneficiary.[20]

Belgian scholars[21] generally accept that domestic transfer pricing rules may conflict with DTCs and therefore cannot always be applied by the Belgian tax authorities in treaty situations.[22]

2.2.2. Article 39, §2, 2a ITC

The matching principle is also used in Belgian internal law with respect to the taxation of pensions. Subject to some conditions pensions are exempted from Belgian income tax. This is, for example, the case if the contributions paid in order to build up the pension have not been tax deducted in the past (cf. article 39, §2, 2a ITC). Belgium must also accept this matching principle also if the pension was built up abroad, even if Belgium has the right to tax according to the convention and even if this results in double non-taxation. The Antwerp Court of Appeal countless times confirmed this with respect to Dutch source pensions.[23] The fact that the Netherlands exempts the pension on the basis of the convention

19 Antwerp, 15 June 1999, TRV, 1999, 582.

20 Brussels, 23 February 2001, FJF, 2001/165.

21 L. Hinnekens, in *Actuele problemen van fiscaal recht*, Kluwer, 1989, 274; B. Peeters, in *Liber Amicorum Maekelbergh*, 1993, 357; E. Van der Bruggen, TFR, 1994, 262 and 279.

22 See also C. Docclo, in *Cahiers de Droit Fiscal International*, Belgian report, IFA Congress 2001, 407.

23 A.o. Antwerp, 23 April 1985, FJF, 85/129; Cass., 20 June 1986, AFT, 1987, 85; Antwerp, 19 March 1990, FJF, 90/97 confirmed by Cass., 18 October 1991, FJF, 92/44; Antwerp, 29 May 1990, FJF, 90/215; Antwerp, 24 June 1993, AFT, 1994, 33; Antwerp, 18 September 1995, AFT,

is irrelevant in this respect. Belgium and the Netherlands have countered this situation of double non-taxation by providing a specific set of rules in the new DTC signed in 2001.

2.2.3. Article 49 BITC

In Belgium business expenses are only tax deductible if the expense is incurred in order to earn taxable income (cf. article 49 ITC). It is generally accepted in Belgium that in spite of the participation exemption for dividends and capital gains on shares, interest payments on loans contracted in order to purchase participations are deductible as business expenses.[24] However, the lower Court of Bruges recently decided that on the basis of the general rule such interest payments are not deductible since in Belgium capital gains on shares are exempted from corporate income tax. The interest payments would therefore not relate to taxable income in the sense of article 49 ITC. Scholars correctly criticised this judgment for several reasons,[25] the most important of which is based on the *Sidro* principle (see above). Indeed, because capital gains on shares are explicitly exempted from income tax they are undoubtedly subjected to a tax regime and therefore even qualify as taxed income according to the *Sidro* principle. At least, they are to be considered as taxable income in the sense of article 49 ITC.

3. Interpreting treaties in order to avoid double taxation or double non-taxation

3.1. Double taxation

In Belgium it is generally accepted that the purpose of DTCs is to protect residents of a contracting state against double taxation of their foreign source income. However, this does not mean that Belgian courts accept that this purpose would be decisive to interpret a treaty in such a sense that double taxation is avoided. Rather on the contrary, Belgian courts interpret DTCs restrictively and as a rule prefer a solution that sticks to domestic law as closely as possible[26] without taking into account the interpretation used in the other contracting state, even if this leads to double taxation.

A clear example hereof is the judgment of the Antwerp Court of Appeal of 26 September 1994[27] regarding a Dutch-source sickness benefit paid to a Belgian

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1996, 85; Antwerp, 22 October 1996, FJF, 97/99; Antwerp 16 September 1997, FJF, 98/7 confirmed by Cass., 17 February 2000, *TFR-net*, 2001, N28; Antwerp, 16 March 1999, FJF, 99/224; Antwerp, 19 October 1999, TFR, 2000, 309; Cass., 11 April 2002, TFR, 2002, 801.

24 R. Deblauwe, comment on Antwerp, 3 April 2001, TFR, 2001, 905.

25 M. Van Keirsbilck, in *Fisk. Koerier*, 2003, 410–430.

26 B. Peeters, in *Cahiers de Droit Fiscal International*, 1993, Belgian report, 233.

27 Antwerp, 26 September 1994, TFR, 1996, 31.

resident. In the Netherlands a sickness benefit paid in case of a disease not exceeding one year qualifies as salary. Since the Netherlands also applies this qualification at treaty level, the benefit was subjected to wage tax in the Netherlands on the basis of article 15 of the (old) DTC. According to the court, however, this item of income does not come under article 15. The court decided that Belgium had the right to tax on the basis of article 22 (other income) of the (old) DTC, in spite of taxation in the Netherlands. The fact that this approach leads to double taxation is thus irrelevant according to the court. Scholars criticised this judgment since the court did not attempt to come to a uniform interpretation based on the common intention of the contracting states.[28] Finally this situation of double taxation only came to an end by the new DTC with the Netherlands (2001), which now provides that sickness benefits are covered by the pension article.

Another example of double taxation concerns the rule accepted in Belgium that only the net foreign income is subjected to Belgian taxation, i.e. after deduction of foreign tax.[29] In the *Dick* case the Court of Cassation ruled that this deduction only applied to the extent that the foreign tax was assessed in accordance with the provisions of the DTC.[30] A Belgian resident is thus not entitled to deduct from his salary Dutch withholding tax wrongly paid in the Netherlands and is therefore taxable in Belgium on the entire amount of his salary, even if part of his salary was not actually paid to him (due to the withholding).[31] To a certain extent this even goes further than double taxation. The taxpayer is indeed taxed twice on (part of) his income which he did not even receive.

3.2. Double non-taxation

Consistently, Belgian case law neither accepts that DTCs should be interpreted in such a way as to avoid double non-taxation. In case of a conflict of qualification between the source state and the state of residence, Belgian courts will rather stick to the qualification provided by Belgian law, even if this leads to double non-taxation. Actually, even the tax authorities are of the opinion that in such a case Belgium should apply its own domestic qualifications.[32]

The judgment of the Brussels Court of Appeal of 24 September 1998[33] is a striking example hereof. The court ruled that if it is not shown that the context requires otherwise, the Belgian authorities may not apply any foreign provisions, nor qualifications resulting therefrom, in order to conclude that Belgium has the right to tax on the basis of the DTC[34] even if this leads to double non-taxation.

28 B. Peeters, *Fisk.Int.*, 1995, no. 135, 7.
29 Commentary on DTCs, 23/101.
30 Cass., 28 May 1968, *Pas.*, 1968, I, 1118; JPDF, 1968, 245.
31 Antwerp, 22 November 1988, FJF, 89/30.
32 Commentary on DTCs, 23/103.
33 Brussels, 24 September 1998, not published. For a comment, G. Van der Heyden, AFT, 1998, 482.
34 We quote from this judgment: “En vertu de cette clause d’interprétation (i.e. article 22 of the DTC with France, comparable to article 3, §2 OECD model) et à défaut de preuve que le contexte exige une autre interprétation, l’administration ne peut appliquer les dispositions du droit

On the occasion of his early retirement a Belgian resident received French-source benefits partly on the account of his French employer and of the French social security organisation (Assédic). Because according to French domestic law the income qualified as a pension, France considered that only Belgium (as state of residence) had the right to tax. The taxpayer claimed that Belgium also had to exempt the income on the basis of the convention since according to Belgian domestic law this kind of income qualifies as salary, which according to the DTC is only taxable in the state in which the activity was exercised, i.e. France. On the basis of the afore-mentioned consideration the Court agreed with the taxpayer. Moreover, the income was taxed in France but the French tax authorities later on changed their position and refunded French taxes because after consulting with the Belgian tax authorities, they agreed that the taxpayer had his residence in Belgium. According to the court, however, the fact that France exempts the income on the basis of the DTC, has no influence at all on the fact that Belgium also has to exempt the income on the basis of the DTC and its domestic law.[35] The court also ruled that the interpretation rule provided for in article 22 of the convention (comparable with article 3, §2 OECD model) might lead to double non-taxation.

Although this judgment dates back before the update of the OECD commentary and in spite of the fact that the DTC with France does not follow the OECD model, it shows that the new approach to article 23 is not (yet) supported by Belgian courts. By the way, the Court does not take the OECD recommendation into account either, according to which any interpretation avoiding double taxation or double non-taxation is more desirable than one leading to double taxation or double exemption.[36] Some scholars criticised the judgment for this reason.[37]

3.3. Other rules related to cases of double non-taxation

3.3.1. Change of internal law

If Belgium has the right to tax but loses this right because of a change in Belgian domestic law, then Belgium must bear the consequences hereof, even if this leads to double non-taxation.

This rule results from the *Freens* case of the Court of Cassation of 21 September 1990.[38] Since the law of 5 January 1976 the income of an active partner in a Belgian partnership no longer qualifies as business profits in Belgium. Hence Belgium could no longer maintain that with respect to non-resident partners it

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fiscal interne français et transposer les qualifications du droit fiscal interne français à la question posée en droit fiscal interne belge."

35 We further quote: "Le fait que la France n'a pas imposé les revenus de source française attribués au requérant par application conjuguée de sa loi interne et des articles 12 et 22 de la convention, n'a aucune influence sur l'application par la Belgique de la convention franco-belge et des dispositions de la loi fiscale belge."

36 OECD report on tax treaty overrides, 1982, par. 19.

37 L. De Broe and J. Werbrouck, TRV, 1999, 492, no. 5.

38 Cass., 21 September 1990, TRV, 1991, 83 commentary by S. Van Crombrugge.

had the right to tax on the basis of article 7 DTC. Before, such active partners were deemed to have a permanent establishment in Belgium. On the basis of an ambulatory interpretation of the (old) DTC with the Netherlands, the Court of Cassation confirms in the *Freens* case that due to the change in Belgian law active partners residing in the Netherlands could no longer come under article 7 but rather under article 22 (other income) of the convention. Because of the change of domestic law Belgium thus lost its right to tax.

In no way did the Court of Cassation take into account the fact that due to this approach double non-taxation arose. Indeed, on the basis of article 15 or 16 of the treaty the Netherlands considered it had no right to tax. Immediately after the *Freens* case and in order to avoid double non-taxation the Belgian and Dutch tax authorities agreed that from tax year 1991 onwards active partners of Belgian partnerships came under article 16 of the convention. However, the legitimacy of the agreement was not always accepted by the courts[39] and was criticised by several scholars.[40] In the relationship with the Netherlands finally the new DTC has put an end to the discussion.

3.3.2. Treaty override

Belgium cannot escape from its treaty obligations, e.g. by providing specific rules, even if the purpose of the change of domestic law is to counter double non-taxation or tax evasion.

A striking example of this rule is the recent discussion in Belgium regarding exit-tax on pensions. Article 364bis ITC (introduced in 1992) provides that if a taxpayer emigrates before his pension is paid, this pension is fictitiously deemed to be allocated the day before his departure. Consequently Belgium would have the right to tax according to the DTCs. Scholars immediately criticised this treaty override.[41] In 1998 the tax authorities accepted that they would refrain from taxation in treaty situations, provided the taxpayer could show that the pension was actually taxed in the other state.[42] However, this last condition is not mentioned anywhere in the law and also conflicts with treaties following the OECD model, i.e. DTCs without a subject-to-tax clause.

In a judgment of 15 February 2002 the Brussels Court of Appeal[43] agreed with the scholars criticising article 364bis ITC and ruled that the tax authorities could not apply this internal law provision if the DTC with France applied even if this led to double non-taxation. In the case at hand France indeed did not tax the pension. The tax authorities argued that a DTC does not guarantee double non-taxation and that the taxpayer thus can only rely on the treaty if there is effective

39 Ghent, 20 June 1996, FJF, 96/194; Brussels, 21 January 1999, *Fisk.Int.*, 1999, no. 185, 6; Ghent, 3 January 2002, *Fisk.Int.*, no. 219, 3.

40 W. Heyvaert, *Fisk.Int.*, 1992, no. 101, 3; S. Van Crombrugge, comment on Ghent, 20 June 1996, AJT, 1996–1997, 26.

41 B. Peeters, *Fisk.Int.*, 1993, no. 110, 1 and *Fisk.Int.*, 1998, no. 174, 6.

42 Ci.RH.852/453.325 of 18 February 1998, *Bull.Bel.*, no. 781, 679.

43 Brussels, 15 February 2002, FJF, 2002/109. The Brussels Court of Appeal confirmed its ruling in a judgment of 17 October 2002, *Fisc.Act.*, 2002, 10/4.

double taxation. The court did not agree with the tax authorities' point of view since the DTC with France did not provide for a subject-to-tax clause.

3.3.3. Domestic reliefs and DTCs

If the exemption results from Belgian domestic law then Belgium evidently must exempt, even if this leads to double non-taxation. As a rule, domestic exemptions do not require effective taxation in the other state. The discussion regarding Dutch-source pensions is a striking example hereof (see above regarding article 39 ITC).

Moreover, as a rule DTCs neither provide for limitations to exemptions, reductions and other reliefs granted by Belgian domestic law.[44] Only in exceptional cases do DTCs provide for specific rules in order to avoid double deductions, e.g. since 1999 the DTC with France has provided that non-residents benefit from personal tax allowances in the source state in the same way as residents but the allowance is limited pro rata to the income earned in the source state on the worldwide income. The same rule is provided for in article 26, §2 of the new DTC with the Netherlands.[45]

3.3.4. Change of internal law in order to avoid double non-taxation

For those cases where Belgium has the right to tax according to the convention, Belgium may of course change its domestic law in order to avoid double non-taxation. Exceptionally, Belgium amends the ITC when voting the law approving the DTC because double non-taxation would arise otherwise, e.g. article 2 of the law approving the DTC with Germany (1967) explicitly provides that the exemption for wages paid to non-residents for activities performed abroad (old article 141, 2 ITC 1964) does not apply to wages and salaries for which Belgium has the right to tax according to article 19 of the convention.[46]

3.3.5. Non-discrimination

When changing its internal law in order to avoid double non-taxation or double deductions Belgium may of course not discriminate between taxpayers.

An example hereof is the discussion that rose in Belgium at the occasion of the reform of the tax regime of non-residents in 1991. The purpose of the reform was *inter alia* to avoid some non-residents benefiting from personal allowances twice, i.e. once in Belgium and again in their state of residence. However, another consequence of the reform was that also in those cases where Belgium had the exclusive right to tax (e.g. in the case of government pensions) non-residents could no longer benefit from personal allowances in Belgium although in such case there was no risk of double deduction. The Court of Arbitration annulled the new regu-

44 Commentary on DTCs, 0/17.
45 See also ECJ, 12 December 2002, case C-385/00, *De Groot*.
46 Art. 2 of the law of 9 July 1969 approving the DTC with Germany.

lation because Belgian national non-residents were discriminated against as compared to other Belgian nationals.[47] Obviously one also has to account for the fundamental freedoms provided for by European law in this respect.

4. Liable to tax in the sense of article 4, paragraph 1 OECD model

Most DTCs signed by Belgium follow article 4 of the OECD model and define a "resident of a contracting State" as any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature.[48] From a Belgian point of view the resident state is usually the state in which the taxpayer is taxable on its worldwide income.[49]

In Belgium it is generally accepted that the wording "liable to tax" does not require effective taxation of the income in the resident state. The mere fact that the taxpayer is subjected in its state of residence to a tax regime mentioned in the convention suffices.[50] However, this also implies that for Belgian tax purposes companies that are not regarded as a separate legal entity will not benefit from treaty protection because such entities are, from a Belgian point of view, not as such subjected to tax, unless of course the DTC provides otherwise.[51]

Belgian coordination centres, pension funds and collective securities investment companies (CSIC, such as the Belgian SICAV and SICAF) meet all these requirements and therefore can claim treaty protection, although their profits are not (or hardly) effectively taxed in Belgium due to a specific regime. The same is true for institutions subject to income tax on legal entities (*rechtspersonenbelasting/impôt des personnes morales*) in Belgium which are only taxable on some items of income (e.g. non-profit-making associations).

Some DTCs provide for specific rules of which we mention two: (a) according to article 4, §4 of the DTC with Switzerland (1978) an individual is not deemed to be a resident for the purpose of the convention if in the state in which he would normally be a resident according to article 4, he benefits from a tax regime according to which he is not subject to tax on income from the other state; (b) Luxembourg 1929 holding companies are excluded from the scope of the DTC

47 Court of Arbitration, 22 November 1991, FJF, 92/2.

48 The DTC with France immediately refers to different criteria (i.e. tie breaker rule). The DTCs with Australia, Ireland, India, Japan, Malaysia, Singapore and the US implicitly refer to the tax laws of the concerned state.

49 Commentary on DTCs, 4/102.

50 The fact that the taxpayer is subject to other taxes, e.g. VAT, is irrelevant.

51 E.g. art. 4.1. DTC Germany and point 5 of protocol I to the (new) DTC with the Netherlands according to which a pension fund which as such is exempted from taxes in the state in which it is situated, shall be considered as a resident of that state. In this case the question whether such fund or institution is a separate legal entity is irrelevant. Cf. W. Heyvaert, in *Het nieuwe Belgisch-Nederlands dubbelbelastingverdrag*, (ed.) B. Peeters, *op. cit.*, 2001, 55.

with Luxembourg because they benefit from a specific tax regime according to which they are not subject to tax on all items of income[52] (paragraph 1 protocol to the Luxembourg DTC of 1970).

5. Certificate of residence[53]

Taxpayers who seek exemption from Belgian taxes on the basis of a DTC have to prove that they are resident of the other contracting state in the sense of article 4. In general this proof is delivered by a certificate of residence issued by the competent authorities of the other state. If the taxpayer cannot deliver such certificate he may prove his fiscal residence by all other means, e.g. an attestation of a local authority, a copy of his passport, etc.[54] The taxpayer is not obliged to prove that his income is effectively taxed in the state in which he claims to be a resident.

The proof the taxpayer has to deliver may differ from DTC to DTC. For example, a resident of Switzerland claiming treaty benefits in Belgium on the basis of the DTC (1978) not only has to prove that he is a resident of Switzerland but also that he is the beneficial owner of the income (see below).

Treaty relief for Belgian withholding tax on dividends, royalties and interests must be requested by using special forms. The taxpayer has to mention on the form the income concerned and the identity of the payer and the beneficiary. The latter must obtain from the tax authorities of the state of residence on the form itself the confirmation that he is a resident of that state and that he is also the beneficial owner of the income.

In the reverse situation Belgian residents who need evidence of tax residence in Belgium under a DTC can obtain from the local Belgian tax office a general attestation form (form 276 Conv., i.e. a certificate of residence). The tax regulations provide that when requesting the form it is necessary to specify the nature and amount of income for which treaty relief will be claimed in the other state. Form 276 Conv. only provides for a prima facie confirmation of residence status and is thus not binding on the tax authorities.

6. Paragraphs 32.6 and 32.7 of the OECD commentary to article 23

We have already mentioned in this report that according to Belgian case law the Belgian tax authorities may not apply foreign law provisions, or qualifications used in the other state that would result from such provisions, in order to con-

52 Commentary on DTCs, 4/129.
53 We refer in particular to the Belgian report of Th. Denayer on practical issues in the application of double tax conventions in *Cahiers de Droit Fiscal International*, 1998, 245.
54 Commentary on DTCs, 4/03.

clude that on the basis of the convention the right to tax is granted to Belgium even if this leads to double non-taxation. We refer in particular to the judgment of the Brussels Court of Appeal of 24 September 1998 mentioned above. In general Belgian courts do not (yet) interpret article 23 in the way it is recommended in paragraphs 32.6 and 32.7 of the OECD commentary to article 23.

However, we also have to mention in this report two examples showing that the interpretation recommended by the OECD was (or is) implicitly used in Belgium in order to counter double non-taxation. The first concerns a judgment of the Antwerp Court of Appeal of 12 October 1999.[55] The second example results from the Protocol to article 3 of the (new) DTC with the Netherlands (2001).

6.1. Antwerp, 12 October 1999

In this case the court was confronted with a possible situation of double non-taxation caused by a differing qualification of the income in Belgium and the Netherlands. A Belgian resident, who was working as an employee in the Netherlands, became disabled for almost four years. For this period he received from the Netherlands a specific allowance. The Belgian tax authorities claimed that this item of income was taxable in Belgium on the basis of article 15 or 22 of the (old) DTC with the Netherlands. The income was not taxed in the Netherlands.

The court first concluded that according to Belgian internal law the income qualified as salary (i.e. remuneration for independent services). The court then verified whether Belgium had the right to tax on the basis of article 15 of the convention according to which salaries, wages and other similar remuneration are only taxable in the state in which the employment is exercised. Since a disability benefit is not explicitly mentioned in article 15, the court verified in a second stage whether the income might be regarded as salary or other similar remuneration in the sense of article 15. The court then applied article 3, §2 of the convention that provides that as regards the application of the convention by a state any term not otherwise defined shall have the meaning which it has under the laws of that state, unless the context[56] requires otherwise. On the basis of these words the court concluded that the context, the logic and the purpose of the convention required that the terms salary and other similar remuneration had the meaning which they had in the state in which the employment was exercised.

The Antwerp Court of Appeal was thus of the opinion that the qualification of the income under the laws of the source state, i.e. the Netherlands, was decisive for the application of the convention in Belgium. The court then stated that disability benefits only qualify as salary under the laws of the Netherlands if the disability does not last longer than one year. Since in the case at hand the taxpayer was disabled for almost four years, the court concluded that the income did not

[55] Antwerp, 12 October 1999, TFR, 2000, 235

[56] Art. 3 of the old DTC with the Netherlands did not mention the word "context". Instead the Dutch version referred to (in Dutch) *zinsverband*, which can be translated as "the connection between sentences". In Dutch the word *zinsverband* is less broad than the word "context". However, the difference between both concepts did not influence the court's judgment.

qualify as salary under Dutch law. Based on this reasoning the court finally concluded that article 15 of the convention was not applicable and that Belgium, as resident state, had the right to tax under article 22 (other income).

It is unclear whether the court was influenced by the fact that if article 15 had been applicable double non-taxation would arise. Scholars have criticised this judgment because the Court did not clearly indicate the reason why in this case the context required that the term "salary" had to be construed under the laws of the source state.[57] Other scholars are of the opinion that the Court immediately could have decided that article 22 was applicable and that the reasoning on the basis of article 3, §2 is superfluous.[58] It is indeed true that in a similar case already mentioned in this report the same court simply ruled that article 22 was applicable.[59] That decision even led to effective double taxation. On the other hand one must admit that the court's reasoning is very close to the new approach, a reason why other scholars[60] agree with the Court's judgment. To our knowledge the judgment of the Antwerp Court of Appeal of 12 October 1999 is unique in Belgium. The same reasoning has not yet been applied by other courts.

6.2. Protocol to article 3 of the (new) DTC with the Netherlands

Protocol I to article 3 of the (new) DTC with the Netherlands (2001) provides for specific rules for hybrid entities, i.e. where a company is subject to taxation in one state while the other state considers the company as a tax transparent entity and taxes the income or property of the company as income or property of the partners.

Protocol I to the DTC provides that in such a case the provisions of this convention shall not be allowed to result in a double taxation or a total or partial exemption of such income or property. The protocol further specifies that in order to avoid such an effect, the tax, the income and the property of the company shall be considered as tax, income and property of the participants in this company pro rata to their entitlement to the company's property.

Partners who have been taxed in the source state due to the tax transparency of the entity will thus also be considered in the resident state as being taxed even if the resident state treats the entity as a corporate body. In addition, if one state taxes the company as a tax transparent entity and the other state does not, the entity can request the latter state, on the basis of the protocol to article 4 of the convention, to tax the company in a transparent way.

The solution given by the protocol to the problem regarding hybrid entities is to a certain degree in accordance with the OECD Report on Partnerships. Scholars had already mentioned that inspiration might be found in the OECD report when applying the protocol to the new convention with the Netherlands.[61] The Netherlands, however, made a reservation at the occasion of the latter report

57 M. Wauman, *Fisc.Int.*, 1999, no. 193, 1.
58 A. Huyghe, TFR, 2000, 242.
59 Antwerp, 26 September 1994, TFR, 1996, 31.
60 L. De Broe and J. Werbrouck, TRV, 2000, no. 35, 435–437.
61 P. Hinnekens, in *Het nieuwe Belgisch-Nederlands dubbelbelastingverdrag*, (ed.) B. Peeters, *op. cit.*, 2001, 32.

because it felt that not all problems were solved by the OECD report. Therefore it was desirable to provide for specific rules in the new DTC with the Netherlands. This is the first and only time that a convention signed by Belgium has provided for specific rules in order to solve problems of double taxation and double non-taxation with respect to hybrid entities. It is thus too early to recognise a trend in Belgian treaty policy.

Finally, we also mention that there is no DTC signed by Belgium providing an article 23, §4 of the OECD model.

7. Interpretation of the term "beneficial ownership"

Since the 1977 update of the OECD model the term beneficial owner has been systematically used in most DTCs signed by Belgium. However, being a civil law country and since Belgian internal law does not provide for any definition of the term beneficial owner, its interpretation is unclear in Belgium.

In its commentary on DTCs the Belgian tax authorities put forward that the legal owner or the usufructuary of shares qualified as the beneficial owner of the dividends paid on the shares.[62] This would mean that the term beneficial owner had to be interpreted for Belgian purposes in a strictly legal sense instead of using an economic approach. To our knowledge there is no specific case law dealing with the interpretation of this concept in Belgium. Belgian scholars agree with a legal instead of economic interpretation of this term. Thus, if the beneficiary of the income has a legal title on the underlying property and provided he is not a mere intermediary (e.g. a paying agent) who acts on behalf and for the account of a third party, the beneficiary will qualify as the beneficial owner of the income, even if he immediately redistributes the income to another party.

For Belgian tax purposes no effective taxation of the income is required in order to qualify as beneficial owner. In the commentary on DTCs the Belgian tax authorities only refer to the fact that no treaty relief is available if the beneficial owner is not a resident of the other State in the sense of article 4 of the convention.

DTCs signed by Belgium do not provide for a definition of the term beneficial owner. Moreover, in general, DTCs do not set a subject-to-tax condition in this respect. The convention with New Zealand (1981) is an exception. Article 3 of this convention provides that in determining (for the purposes of articles 10, 11 or 12) whether dividends, interest or royalties are beneficially owned by a resident of New Zealand, dividends, interest or royalties in respect of which a trustee is subject to tax in New Zealand shall be treated as being beneficially owned by that trustee.

Other treaties provide for specific anti-abuse measures without setting a subject-to-tax condition, e.g. according to the DTCs with Estonia (1999, article 28), Latvia (1999, article 29) and Lithuania (1998, article 29) no treaty relief is available if the main purpose or one of the main purposes of any person concerned

62 Belgian commentary on DTCs, 10/204.

with the creation or assignment of an item of income was to take advantage of the provisions of the convention. The DTC with Switzerland (1978) also provides for a specific rule. According to article 4, §4 of this convention a person who is merely the seeming recipient of the income is not regarded as a resident for the purpose of the convention if the person who actually receives the income – either directly or indirectly through other individuals or legal entities – is not a resident in the sense of article 4 of the convention.

8. Avoiding non-taxation by applying specific bilateral provisions

8.1. Subject-to-tax clauses

Belgium has signed about 80 DTCs. Only a minority provide for a specific subject-to-tax clause. Some DTCs refer in article 23 to income which has been taxed, e.g. the DTCs with Japan (1968), US (1970) and Malaysia (1973). In other DTCs article 23 refers to items of income which are (is) taxed, e.g. the DTCs with Belarus (1995), Estonia (1999), Iceland (2000), Indonesia (1997), Latvia (1999), Lithuania (1998), Mauritius (1995), Mongolia (1995), the Netherlands (2001), Ukraine (1996), Uzbekistan (1996), Philippines (1976), Slovakia (1997), Slovenia (1998) and the Czech Republic (1996). There is no difference between the wordings.

Some DTCs follow article 23 of the OECD model (cf. may be taxed) but provide for a subject-to-tax condition with respect to other treaty provisions, e.g. with respect to article 21 (other income). We will comment on these clauses further in this report.

8.2. Source is determined by taxation in the source state

In some DTCs signed by Belgium source is determined by taxation in the source state, e.g. article 23(4) of the DTC with Egypt (1991) provides that income of a resident of a contracting state which is taxed in the other contracting state shall be deemed to arise from sources in that other state. Article 23 (1b) of the DTC with New Zealand (1981) also provides that income of a resident of New Zealand which is taxed in Belgium in accordance with the convention shall be deemed to arise from sources in Belgium. Finally, according to article 23(2) of the DTC with the US (1970) income which has been taxed by Belgium in accordance with articles 6 through 21 shall, for the purpose of applying the United States credit in relation to Belgian tax, be treated as income from Belgian sources.

8.3. Taxation in the state of residence as a requirement for the application of the tax treaty in the source state

We refer to article 4, §4 of the DTC with Switzerland (1978) already mentioned in this report according to which an individual is not deemed to be a resident for the purpose of the convention if in the state in which he would normally be a resident according to article 4, he benefits from a tax regime according to which he is not subject to tax on income from the other state.

8.4. Taxation in the state of residence as a requirement for the exclusive taxing right of the state of residence

Some DTCs signed by Belgium provide that other income is only taxable in the state of residence if it is subject to tax there, e.g. the DTC with Romania (1996). According to the DTCs with Denmark (1969), Greece (1968), Luxembourg (1970) and South Africa (1995) other income is not taxable in the source state if the income is taxable in the state of residence. The DTC with Mauritius (1995) provides that other income may be taxed in the source state if the income is not taxed in the state of residence. The DTCs with Belarus (1995), Kazakhstan (1998), the Netherlands (2001), Slovenia (1998), Spain (1995), Russia (1995), Ukraine (1996) and Vietnam (1996) provide that other income is only taxable in the state of residence if the income is taxed in the state of residence.

We have already mentioned in this report that Belgium indeed made a reservation on article 21 of the OECD model. Belgium reserves the right to tax Belgian source income if the state of residence does not effectively exercise that right.[63]

Another example is article 18, paragraph 4 of the DTC with Canada (1975). According to this provision any alimony or other maintenance payment arising in a contracting state and paid to a resident of the other contracting state who is subject to tax there in respect thereof, shall be taxable only in that other state.

8.5. Non-taxation in the state of residence as a reason for taxation in the state of source

According to some DTCs treaty relief is only available in Belgium if the income is effectively remitted to the state of residence. Such remittance clauses are provided for in the DTCs with Cyprus (1996), Ireland (1970), Malta (1974), Singapore (1972) and the UK (1987) because under the laws of these countries income is only subject to tax if remitted to these states. The purpose of these clauses of course is to avoid double non-taxation.

As a general rule, article 18 of the DTC with the Netherlands provides that the state of residence has the right to tax pensions. However, under certain conditions the source state may tax the pension if the pension benefits from an advantageous tax treatment in the state of residence. To some extent the favourable treatment in the state of residence is the reason for taxation in the source state.

63 OECD commentary, 21/16.

9. Procedural issues

Belgian internal law does not provide for a specific procedure if the other state changes the assessment and refunds taxes that were wrongly paid under the convention. The mere fact that the other state changes its position is no reason for taxation in Belgium. This is clearly illustrated by the judgment of the Brussels Court of Appeal of 24 September 1998 already mentioned in this report. The court ruled that according to the convention Belgium had to exempt the income even though France changed its position and refunded French taxes to the Belgian resident taxpayer. The fact that double non-taxation occurred was irrelevant according to the court.

If the other state grants remission and Belgium therefore regains the right to tax, taxation can only occur in Belgium if the Belgian domestic timing limits have not expired. In practice this will rarely be the case since the ordinary period of limitation expires at the end of the third year following the income year. The term is extended with two years in case of fraud but the mere fact that the taxpayer is of the opinion that the right to tax is granted to the other state, does not automatically imply fraud.

For the sake of completeness, we also mention a specific period of limitation applicable in treaty situations. If a tax audit carried out by the tax authorities of the other state reveals that income was not declared by the taxpayer in Belgium during one of the five years preceding the year during which the results of the foreign audit were communicated to the Belgian tax authorities, Belgian tax may be assessed during an additional term of 12 months. This specific period of limitation starts from the moment the results of the foreign audit were transmitted to the Belgian authorities. However, it is only applicable in cases where income was not declared in Belgium and thus may not be used by the Belgian tax authorities to assess tax on income the taxpayer mentioned in his income tax return but for which the taxpayer wrongfully claimed exemption on the basis of the convention.

Belgian internal law neither provides for specific rules for the reverse situation. If the other state taxes the income and Belgium therefore loses its right to tax, Belgium will not automatically refund Belgian taxes that were wrongly paid. If all objection periods have expired, effective double taxation will occur. In general, the taxpayer only has three possibilities to claim a refund of wrongly paid Belgian taxes. (a) First is an ordinary tax protest. However, the protest must be filed within three months from the date the notice was sent to the taxpayer or from the date of notification of the assessment. In most cases this period will have expired though. (b) The second is relief *ex gratia*: if income was taxed in the other state and in Belgium contrary to treaty provisions (i.e. effective double taxation),[64] the Belgian authorities may *ex gratia* grant remission and may refund wrongly paid Belgian tax. The request must be filed within three years from 1 January of the year during which Belgian tax was wrongly assessed. (c) The

[64] Cass., 14 December 1973, *Bull.Bel.*, no. 523, 2246.

mutual agreement procedure provided for in the DTCs, the conditions and terms of which depend on the applicable convention, provides a third means to claim a refund.

Résumé

La Belgique prend généralement le modèle de l'OCDE comme base de négociation des conventions et a une nette préférence pour la méthode de l'exemption progressive. La Belgique n'utilise la méthode de l'imputation que pour les revenus des intérêts et des redevances. La Belgique a signé environ 80 conventions de double imposition (DTC). La plupart d'entre elles ne renferment pas de clause d' "assujettissement à l'impôt". Néanmoins, la Belgique s'efforce d'insérer de plus en plus de dispositions de ce type dans ses DTC. La réserve concernant l'article 21 formulée par la Belgique à l'occasion de la mise à jour du modèle de l'OCDE en 1997 est révélatrice de cette tendance de la politique fiscale belge. La Belgique a déjà signé plusieurs DTC dans lesquelles la portée de l'article 21 est limitée aux éléments de revenu qui sont imposés dans l'État de la résidence.

Sur la base de l'affaire *Sidro* portée devant la Cour de cassation, il est généralement admis en Belgique que le revenu doit être considéré comme imposé au sens de la loi interne belge à partir du moment où ce revenu a été soumis à son propre régime fiscal dans l'État de la source, même si le revenu est exempté en vertu du régime interne de cet État. En Belgique, ce principe est généralement énoncé par la maxime "exemption vaut impôt". À notre avis, le principe *Sidro* s'applique également à l'interprétation des clauses d'"assujettissement à l'impôt", à moins que ce ne soit contraire à l'intention commune des États contractants.

Si la DTC suit l'article 23A du modèle, la Belgique est tenue d'exempter lorsque le revenu peut être imposé dans l'autre État, indépendamment du fait que ce revenu est ou non effectivement imposé dans l'État de la source.

Les tribunaux belges n'acceptent pas que les DTC soient interprétées de façon que la double imposition ou la double non-imposition doive être évitée. En cas de conflit de qualification entre l'État de la source et l'État de la résidence, les tribunaux belges s'en tiendront de préférence à la qualification prévue par la législation belge, cette attitude dût-elle conduire à une double imposition ou à une double non-imposition. Ainsi, la nouvelle approche de l'article 23 n'est pas (encore) soutenue par les tribunaux belges. D'un autre côté, le protocole I à la DTC conclue avec les Pays-Bas (2001) prévoit une série de règles voisines de la nouvelle approche. Toutefois, il est encore trop tôt pour discerner une tendance quelconque dans la politique belge en matière de conventions.

En Belgique, le terme de "bénéficiaire effectif" est interprété dans un sens strictement juridique. Si le bénéficiaire du revenu possède un droit légal sur le bien sous-jacent, et à condition qu'il ne soit pas un simple intermédiaire agissant au nom et pour le compte d'une tierce partie, il remplira les conditions requises pour être le bénéficiaire effectif du revenu.

Enfin, la législation interne belge ne prévoit pas de procédure spécifique au cas où l'autre État change les modalités d'imposition et rembourse les impôts indûment payés aux termes de la convention.

Zusammenfassung

Belgien folgt im Allgemeinen dem OECD-Musterabkommen als Grundlage für Abkommensverhandlungen und zieht die Freistellungsmethode mit Progressionsvorbehalt ein-

deutig vor. Belgien wendet die Anrechnungsmethode nur bei Zins- und Lizenzerträgen an und hat etwa 80 DBAs unterzeichnet, wobei die meisten keine Besteuerungsklausel enthalten. Dennoch versucht Belgien verstärkt, in die DBAs Besteuerungsvorschriften aufzunehmen. Den von Belgien vorgebrachten Einwand gegen den Artikel 21 bei der Revision des OECD-Musterabkommens von 1997 zeigt den Trend der belgischen Abkommensvorschriften. Belgien hat bereits mehrere DBAs unterzeichnet, bei denen der Anwendungsbereich von Artikel 21 auf im Ansässigkeitsstaat versteuerte Einkünfte beschränkt wurde.

Aufgrund des Falles *Sidro* beim Kassationsgericht wird in Belgien allgemein anerkannt, dass Einkünfte nach belgischem Recht als versteuert gelten, wenn sie dem Besteuerungsrecht des Quellenstaates unterliegen, auch wenn diese Einkünfte nach innerstaatlichem Steuerrecht des Landes nicht steuerpflichtig sind. Dieses Prinzip wird im Allgemeinen auf den Rechtsgrundsatz der Freistellung (*exemption vaut impôt)* bezogen. Unserer Auffassung nach gilt das *Sidro*-Prinzip auch bei der Auslegung der Besteuerungsvorschriften, es sei denn, diese widersprechen der gemeinsamen Zielsetzung der Vertragsstaaten.

Folgen die DBAs dem Artikel 23A des Musterabkommens, muss Belgien Einkünfte von der Steuer befreien, die in einem anderen Staat besteuert werden können, und zwar ohne Rücksicht darauf, ob diese im Quellenstaat tatsächlich besteuert werden.

Die belgischen Gerichte akzeptieren nicht, dass aufgrund der Auslegung der DBAs eine Doppelbesteuerung oder doppelte Nichtbesteuerung zwingend vermieden werden muss. Im Falle eines Qualifikationskonflikts zwischen dem Quellenstaat und dem Ansässigkeitsstaat werden belgische Gerichte bei der Qualifikation belgischem Recht folgen, auch wenn dies eine Doppelbesteuerung oder doppelte Nichtbesteuerung zur Folge hat. Der neue Ansatz zum Artikel 23 wird deshalb von belgischen Gerichten (noch) nicht unterstützt. Andererseits enthält das Protokoll I für die DBAs mit den Niederlanden (2001) Bestimmungen, die dem neuen Ansatz nahe kommen. Dennoch ist es zu früh, um einen Trend in den belgischen Abkommensrichtlinien erkennen zu können.

Der Begriff “Nutzungsberechtigter” wird in Belgien strikt im rechtlichen Sinne ausgelegt. Falls der Nutzungsberechtigte von Einkünften einen Rechtstitel für das zugrunde liegende Eigentum besitzt und vorausgesetzt, dass er nicht als reiner Vermittler namens und im Auftrag Dritter handelt, qualifiziert er sich als wirtschaftlicher Eigentümer dieser Einkünfte.

Letztendlich sieht das belgische Recht im Fall einer Veranlagungsänderung durch den anderen Staat und von Steuererstattungen, die fälschlicherweise gemäss Abkommen gezahlt wurden, keine spezifische Verfahrensweise vor.

Resumen

Bélgica utiliza generalmente el modelo de la OCDE como base para la negociación de sus convenios, prefiriendo claramente el método de exención progresiva. Bélgica utiliza el método de la imputación solamente en los ingresos de intereses y cánones. Bélgica ha concluido alrededor de 80 convenios de doble imposición (CDI), que en su mayoría no contienen la cláusula de “sujeción a tributación”, si bien esforzándose en incluir cada vez más disposiciones de este tipo en los mismos. La reserva relativa al artículo 21 formulada por Bélgica en la actualización del modelo de la OCDE de 1997 revela esta tendencia de la política tributaria belga. Bélgica ha concluido varios CDI en que se limita el alcance del artículo 21 a los elementos de renta gravados en el estado de la residencia.

En general y con base en el asunto *Sidro* presentado ante el Tribunal Supremo, se admite que la renta de ser considerada como gravada en el sentido de la legislación interna cuando ha estado sujeta a su propio régimen fiscal en el estado de la fuente, incluso si ha resultado

exenta en base a la legislación interna de dicho estado. Este principio se enuncia en Bélgica por la máxima *exemption vaut impôt*. El principio *Sidro* se aplica también, en nuestra opinión, a la interpretación de las cláusulas de "sujeción a tributación", a menos que vaya en contra de la intención común de los estados contratantes.

Si el CDI sigue el artículo 23A del modelo, Bélgica deberá eximir cuando la renta pueda ser gravada en el otro estado, y ello con independencia de que resulte o no realmente gravada en el estado de la fuente.

Los tribunales belgas no aceptan que los CDI se interpreten de forma que conduzca a que la doble imposición (DI) o la doble no imposición (DNI) deban ser evitadas. En caso de conflicto de calificación entre el estado de la fuente y el de la residencia, los tribunales belgas aplican preferentemente la calificación prevista por la legislación interna, incluso aunque conduzca a una DI o a una DNI. Así, los tribunales belgas no aplican (aún) el nuevo enfoque del artículo 23. Por otra parte, el protocolo I al CDI concluido con Holanda (2001) prevé una serie de normas cercanas al nuevo enfoque. No obstante, aun es pronto para establecer cualquier tendencia de la política belga en materia de CDI.

El término "beneficiario real" se interpreta en Bélgica en un sentido estrictamente jurídico. Si el beneficiario de la renta tiene un derecho legal sobre el bien subyacente, y no es un simple intermediario que obra en nombre y por cuenta de un tercero, cumple las condiciones requeridas para ser el beneficiario real.

En fin, la legislación interna belga no prevé procedimiento específico alguno para el caso en que el otro estado cambie los modos de imposición y reembolse los tributos indebidamente pagados a tenor de los términos del CDI.