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Branch Reporter
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1. Introduction**

Belgium has not developed a general approach (through either legislation or case law) to determine the geographical source of taxation. Belgian tax law does not define the notion "source" and the expression is only used in one specific article of the Belgian Income Tax Code (ITC).[1]

The law distinguishes between two sets of source rules: source rules which determine whether income derived by a Belgian resident qualifies for the purposes of unilateral tax relief and source rules which determine when income derived by a non-Belgian resident is taxable in Belgium. The legal rationale of these sets of rules is fundamentally different: the first set is meant to take income out of the scope of Belgian taxation while the second set aims to bring income within the scope of Belgian taxation. The precise country in which the income arises is generally speaking not that important for the first set of rules as long as the localisation is outside Belgium. The source rules of the second set are broader for certain types of income than the source rules of the first set. Notwithstanding the above, it has been argued that the different source rules should be interpreted in the same way as far as possible to the extent that the text of the law allows, regardless of their legal rationale.[2] The precise source rule applicable within each set depends also to a great extent on the characterisation of the income.

References to source can also be found in a few other tax provisions but these references do not have a specific meaning. However, to determine whether profits distributed by a company are considered offshore profits for the purpose of the participation exemption regime, the "localisation of the debtor" (outside the residence state of the distributing company) is defined as a specific source rule.[3]

The law does not contain specific rules to determine when income is sourced in another country for the purpose of tax relief under a double taxation treaty

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1 Art. 466bis ITC.
2 L. Hinnekens, *De territorialiteit van de Belgische belastingen in het algemeen en op de inkomsten in het bijzonder* (1985) Brussels, Ced. Samsom, 112.
3 Art. 203, §1, 3° ITC; Q. & A., House of Representatives, 29 June 1998, 18570 (Q. no. 1006 Vandeurzen); Q. & A., House of Representatives, 10 August 1998, 19302 (Q. no. 1387 Didden).

(DTT). For a Belgian resident individual (Belgian individual), the law simply refers to income exempt in Belgium by virtue of a DTT.[4] For a Belgian resident company (Belgian company), the law refers to a result obtained outside Belgium that is exempt by virtue of a DTT.[5] The source rules referred to above can, as a rule, not be used since they do not refer to a DTT. However, to distinguish between Belgian and foreign income in the hands of a Belgian company, the Revenue applies the same rules as those that determine when income is obtained abroad for the purpose of unilateral tax relief.[6]

The DTTs contain allocation rules which determine when a state is entitled to tax income and tax relief rules in the hands of a resident regarding income that may be taxed in the other state under the allocation rules. In principle, a DTT ensures that the allocation and the relieving provisions correspond. The "source" of income is in a state if it is taxable in that state under the DTT. Therefore, any consideration of "source" within the meaning of the residence state is eliminated and no specific reference to the notion "source" in the relief provision is required.[7] However, a number of DTTs do refer to "source" in either the exemption article[8] or in the entire relief provision.[9] These references are unnecessary. For dividends, interest and royalties, the relief provision requires that such are taxable in accordance with articles 10, 11 and 12 and refer at the same time to either the participation exemption regime for dividends or the foreign tax credit (FTC) for interest and royalties. In addition, a number of DTTs include in this provision a reference to the notion "source".[10] This could potentially create a conflict between Belgian and DTT source rules. In practice, however, no such conflict arises. Hence, it can be concluded that the Revenue interprets the source rule of the participation exemption regime in the same way as that of the DTT[11] while the FTC does not as such contain a source rule and no country-by-country approach is applied.

2. Foreign source income earned by residents

2.1. Principles

A resident is taxable on his worldwide income, even if some items have been obtained or derived outside Belgium.[12] In principle, no limitations exist on the overall tax liability of residents. However, there are special rules for, for example, diplomats[13] and expatriates.[14] It is irrelevant whether or not the foreign income has been derived in a DTT country.

4 Art. 155 ITC.
5 Art. 75, s. 1, 3° RD/ITC.
6 Com. ITC, no. 199/11.
7 J.F. Avery Jones *et al*., "Tax treaty problems relating to source" (1998) ET, 87.
8 For example, the DTT with Luxembourg.
9 For example, the DTT with the USA.
10 For example, the DTT with the UK.
11 Com. DTT, no. 10/102.
12 Arts. 5 and 183 ITC.
13 Art. 4 ITC.
14 Ci.RH.624/325.294, 8 August 1983, *Bull. Bel.*, no. 620, 2061–2078.

Neither the tax treatment nor the level of taxation of the income abroad is relevant. However, it may become relevant in order to ascertain whether a tax relief measure applies. In addition, the tax regime to which a non-resident is subject is relevant for the deductibility of payments made by a resident to such a non-resident (for example, interest and management fees),[15] and for the purposes of the transfer pricing rules[16] and an anti-abuse provision which allows the Revenue to disregard certain transactions.[17]

No controlled foreign company (CFC) legislation exists. As a rule, the income of a foreign company is not taxable in Belgium until remitted to a resident. However, Belgium has mechanisms which have a similar effect to a certain extent.[18]

The source of the income is not relevant, except in the following circumstances.

First, the application of a tax relief measure. Income obtained outside Belgium in a DTT country is eligible for relief under the applicable DTT. This implies that a relevant cross-border element is available and that the country in which the income concerned arose can be determined.[19] Income obtained in a non-DTT country may benefit from a unilateral measure.

Secondly, the attribution of income and expenses in view of the calculation of the net taxable basis and its apportionment based on geographical origin. For example, if a Belgian individual obtains employment income from different countries as a result of a single professional activity, the actual costs may be deducted on a per country basis from the income to which they relate.[20] The net taxable basis of a Belgian company is divided into income obtained (a) in Belgium; (b) abroad that is not exempt by virtue of a DTT; and (c) abroad that is exempt by virtue of a DTT.[21] Tax losses realised are divided in the same way and are deducted from the profits obtained in other countries on the basis of a specific order.[22] General administrative expenses of a Belgian company are only deductible from Belgian income unless a DTT allows the allocation (on the basis of criteria such as turnover or gross profit, depending on the nature of the activities) of part of these expenses to a foreign permanent establishment (PE). Directors' remuneration is also only deductible from Belgian income, except when it remunerates performances for the benefit of a PE in which case it needs to be allocated to that PE.[23] Localisation of the expenses is, however, irrelevant for its deductibility. Hence, all expenses are deductible if they satisfy the conditions of article 49 ITC, regardless of where they are located.[24]

15 Arts. 54 and 198, 11° ITC.
16 Art. 26 ITC.
17 Art. 344, §2 ITC.
18 For example, arts. 29, §1, 203, §1, s. 1, 5° and 344, §2 ITC.
19 I. Claeys Bouuaert, "Binnenlandse of buitenlandse inkomsten: criteria tot onderscheid" (1981) *Tijdschrift voor Notarissen*, 36.
20 Art. 7, §3 RD/ITC.
21 Art. 75, s. 1 RD/ITC. The distinction between (a) and (b) is no longer relevant since income obtained in a non-DTT country is currently taxable in the same way as income obtained in Belgium. The RD/ITC should still be modified.
22 Art. 75, s. 2 RD/ITC.
23 Com. ITC, no. 199/14.
24 Claeys Bouuaert, *op. cit.*, 44.

Thirdly, the source is relevant for a number of specific provisions, for example, the deferred taxation of certain capital gains realised[25] and the "investment deduction regime".[26]

2.2. Treatment

The worldwide net taxable basis of a resident is calculated in accordance with the Belgian tax rules. It follows that the amount of foreign income included in that basis can be different from the amount that was taken into account for the purpose of the foreign tax treatment. The law does not treat income obtained by a Belgian company differently based on whether it is primarily foreign or domestically owned.

Foreign income tax or withholding tax is, contrary to Belgian income and withholding tax, deductible provided it has been paid or levied in accordance with the applicable tax law.[27] As a general rule, the deduction can only apply to foreign income.[28] For a Belgian individual, the Revenue accepts the deduction from foreign professional income prior to the application of the lump sum cost deduction.[29] A Belgian individual employee cannot deduct the income tax paid abroad in a given year if he has only received Belgian taxable salary in that year.[30] In practice, the Revenue nonetheless allows for such a deduction of foreign taxes if they have been paid after the taxpayer transferred his fiscal residence to Belgium.[31] The deduction of foreign income and withholding tax is not a tax relief measure but is intended to determine the amount of deductible expenses. There is no reference to "source". It is only relevant that tax has actually been levied abroad, regardless of its localisation.[32]

For a Belgian company, all income obtained is considered business profit in determining the net taxable basis. Its nature is only relevant for the application of withholding tax and a tax relief measure. The ordinary corporate income tax (CIT) rate is 33 per cent (plus 3 per cent "crisis surcharge") but reduced rates apply under certain conditions. For a Belgian individual, the nature of the income is also relevant in view of the applicable income tax rate. In principle, the ordinary progressive income tax rates, ranging from 25 per cent to 50 per cent (plus a municipal surcharge), apply. However, for example, foreign dividends, interest and royalties are taxable at a rate of 25 per cent or 15 per cent (plus municipal surcharge if taxed on assessment). Foreign deferred employment income can be subject to either progressive or separate rates, or can be exempt depending on, for example, the type of pension plan. Certain income items are not taxable, such as capital gains realised within the scope of the normal administration of one's private estate.

25 Art. 47 ITC.
26 Art. 68 ITC.
27 Com. ITC, no. 53/64; Cass., 28 May 1968, *Bull. Bel.*, no. 463, 705–711; Antwerp, 22 November 1988, FJF, no. 89/30.
28 Q. & A., House of Representatives, 14 June 2004, 5547–5548 (Q. no. 359 Douifi).
29 Com. ITC, no. 51/11.
30 Brussels, 13 November 2003, *Fisc. Int.*, no. 244, 5–6.
31 Com. ITC, no. 51/12.
32 Claeys Bouuaert, *op. cit.*, 35.

A Belgian individual who obtains employment income (including deferred compensation) that has been paid or attributed in Belgium or abroad will be subject to wage withholding tax provided the debtor is either a resident or a non-resident for whom the income constitutes an expense that is deductible exclusively from its Belgian taxable professional income.[33] Income is "attributed" if the recipient can actually dispose of and collect the income.[34] It seems sufficient that a Belgian establishment (BE) is present, regardless of whether or not it constitutes a PE under the applicable DTT.[35] It may be assumed that the income actually has to be at the expense of the establishment and that a notional allocation is not applied.[36] This deviates from the interpretation of the rule governing the deductibility of costs for a BE.[37] Employment income recharged by a foreign company to a Belgian company is in principle not subject to wage withholding tax. Neither the localisation of the place where the activity was performed nor the place of residence of the company for the benefit of which the activity was performed is relevant. However, no wage withholding is due if a DTT prevents Belgium from levying tax.

A Belgian individual is taxable on the transfer of pension reserves from a pension fund or a group insurer to a fund or insurer located abroad.[38] According to the Revenue,[39] this also applies when the transferor is located outside Belgium, although case law has held this position incompatible with the law.[40]

A Belgian company that receives a dividend of which the debtor is a foreign company is exempt from Belgian dividend withholding tax.[41] The exemption should also apply if the shares are allocated to a foreign establishment. The law also exempts certain interest payments and royalties from withholding tax if the receiver is a Belgian company.[42] Also in these situations, the exemption should remain available even if the underlying assets are allocated to a foreign establishment of the recipient. Hence, a Belgian company and its foreign establishment form one legal entity with one consolidated tax basis. Furthermore, if a DTT applies, the Belgian recipient can invoke the DTT with the debtor of the income irrespective of the location of its PE.

2.3. Avoidance of double taxation

The unilateral measures must be considered as the basic system for reducing international double taxation, while the DTT provisions are complementary.[43] Therefore, these measures can also apply if a DTT exists, for example, when an income item can be taxed in the two states. The unilateral measures will, however, not apply if a DTT provision provides otherwise.

33 Art. 270, 1° ITC and art. 87, 1° RD/ITC.
34 Antwerp, 16 February 1982, FJF, no. 82/76.
35 Ci. no. AFZ/96-258 (AFZ 17/2003), 24 July 2003, no. V.
36 J. Lambrechts and J. Van Langendonck, "Toepassingsgebied van de Belgische bedrijfsvoorheffing uitgebreid" (1999) AFT, 14, 15, 16 and 18.
37 Art. 237 ITC.
38 Art. 364ter, s. 2 ITC.
39 Com. ITC, no. 364ter/8.
40 Leuven, 12 March 2004, *Fisc. Int.*, no. 248, 5–8.
41 Art. 106, §1, s. 1 RD/ITC.
42 For example, art. 107, §2, 7° and 9° and 111 RD/ITC.
43 *Doc. Parl.*, House of Representatives, 1961–1962, no. 264/1, 85.

2.3.1. Unilateral measures

2.3.1.1. Companies

2.3.1.1.1. Participation exemption regime

Dividends and capital gains realised on shares are taxable unless the participation exemption regime applies.[44] Subject to certain conditions, 95 per cent of the gross dividend minus foreign withholding tax will be deducted from the taxable basis if and to the extent that this dividend is still included. The remaining 5 per cent is subject to CIT but can be compensated by costs incurred. Capital gains are fully exempt if all the dividends which may be derived from the shares qualify under the subject-to-tax requirement of the regime.

The regime applies to dividends granted or attributed by a Belgian or a foreign company. Therefore, it should be regarded as a general measure to avoid double taxation. It may be assumed that the notion "granted or attributed" must be interpreted in the same way as the notion "paid or attributed" for the purpose of withholding tax. The regime does not apply to dividends derived from shares in a Belgian or a foreign company which are used for professional activities in a PE located outside Belgium and the profits of which are exempt in Belgium by virtue of a DTT.[45]

The subject-to-tax requirement has been drafted in a negative way in that it will be satisfied if the income is not granted or attributed by a company falling within one of a number of exclusions.[46] Although these exclusions apply to Belgian and foreign companies, they are only relevant for dividends derived from shares held in a foreign company (except in one specific exclusion). The same goes for the capital gains exemption. Under these exclusions, the tax regime of the foreign company must, generally speaking, be compared with either the CIT regime or the normal local foreign tax regime. Under two exclusions, the total tax effectively levied at the level of the distributing company should be at least 15 per cent. However, this requirement does not apply if the foreign company (and its branch) are both located in the EU. For the other exclusions, the 15 per cent criterion is not provided for in law but could arguably serve as a rule of thumb.

2.3.1.1.2. Foreign tax credit

Interest and royalties are taxable but can qualify for a FTC provided they have been subject to a tax abroad that is comparable to Belgian individual income tax, CIT or non-resident income tax. The interest and royalties must have been generated by movable assets or capital used in Belgium for carrying on a professional activity.[47] Thus, the FTC does not apply if the assets or capital are part of a PE located outside Belgium of which the profits are exempt by virtue of a DTT. Neither the place where the contract is concluded nor the place where the interest and royalties are paid is relevant.

[44] Art. 192, §1, s. 1 and 202–205 ITC.
[45] Art. 205, §1 ITC.
[46] Art. 203 ITC.
[47] Art. 285, s. 1 ITC.

The country in which the foreign tax has been levied is not relevant but only that a tax was levied abroad. Therefore, the FTC regime cannot be deemed to contain a source rule.[48] However, arguably, the intention of the legislator was that the tax be levied in the country of origin of the income.[49] No definition of "country of origin" is given but it is reasonable to assume that this should be defined as the country where the debtor is located. It may be assumed further that the FTC only applies to income from countries with an income tax structure comparable to that of Belgium.[50] Effective taxation abroad is required.[51]

The foreign tax need not have already been withheld and paid at the time the FTC is claimed. The Revenue allows the FTC if the Belgian company is able to demonstrate that the interest/royalty is or will be subject to tax on the due date.[52] It is not sufficient that a foreign debtor levies withholding tax but rather that this withholding tax is actually paid to the foreign Revenue.[53]

For royalties, the FTC amounts to 15/85 of the net income, even if the effective withholding tax levied abroad is lower or higher than 15 per cent. For interest, the FTC calculation takes into account the effectively levied foreign withholding tax but is capped to a maximum of 15 per cent. This limitation will result in double taxation if and to the extent that the foreign interest withholding tax is higher than 15 per cent.[54] The FTC is applied to the gross amount of the interest/royalty minus foreign withholding tax. It is included in the taxable basis and any excess is not refundable and cannot be carried forward.

2.3.1.2. Individuals

The law provides that the individual income tax proportionally related to three types of foreign income included in the total amount of taxable income is reduced by 50 per cent.

The first type is income derived from immovable property located outside Belgium.[55] It need not be received outside Belgium nor have been subject to tax in the state where it is located.

The second type is professional income[56] "obtained" and "taxed" abroad.[57] This applies only to income that would be subject to the progressive income tax rates (and not to separate tax rates) if it had not been obtained outside Belgium.

48 Hinnekens, *op. cit.*, 112; Avery Jones, *op. cit*., 91.
49 *Doc. Parl.*, House of Representatives, 1961–1962, no. 264/1, 21.
50 F. Vanistendael, "Unilateral measures to prevent double taxation" (Belgian report), in *Cahiers de droit fiscal international* (1981) vol. 66b, Deventer, Kluwer, 213.
51 *Doc. Parl.*, House of Representatives, 1961–1962, no. 264/1, 21.
52 P. Smet, *Handboek Roerende Voorheffing* (2003) Kalmthout, Biblo, 452.
53 Ghent, 14 January 2004, TFR, 262.
54 For example, a Belgian resident company receives interest from a company A with an establishment located in B and both A and B are allowed to levy withholding tax. The aggregate taxation by A and B may exceed 15 per cent.
55 Art. 156, 1° ITC.
56 Exception: movable property income that is used for the performance of a professional activity in an establishment located in Belgium.
57 Art. 156, 2° ITC.

Professional income is "obtained" abroad if it results from a professional activity exercised abroad.[58] This has been confirmed by the Supreme Court.[59] In principle, it is not required that business profit be obtained through the intervention of an establishment located abroad although, practically speaking, it is accepted that such profit can only be deemed "obtained" abroad if it is attributable to such an establishment.[60] Employment income does not need to be at the expense of a foreign company or establishment. Only an effective physical presence outside Belgium during the carrying on of a professional activity (without a minimum period of physical stay being required) is necessary.[61] However, the reduction only applies to directors' income if it is derived from activities carried out for the benefit of an establishment located abroad and allocated to its results.[62] Deferred compensation seems to be deemed "obtained" abroad if it is at the expense of a debtor located outside Belgium.[63]

Professional income can be considered as "taxed" abroad if it has been subject to the normal foreign tax regime. This is the *Sidro* doctrine which was developed by the Supreme Court.[64] A principal subjection to tax is sufficient irrespective of whether some income items are tax exempt under the foreign law (*exemption vaut impôt*). Neither the form of the foreign tax, the way it is levied nor the tax rate is relevant,[65] although the Minister of Finance seems to require an "actual income tax".[66] The foreign tax does not need to result in a fiscal burden which is equal or comparable to that in Belgium on the same or similar income.[67] The law does not require that the foreign taxation take place in the country where the income has been "obtained". It could thus be said that no source rule is provided for.[68] However, in its *Sidro* case law, the Supreme Court refers to "the country of origin" notion, as does the Revenue in its guidelines.[69] On the basis of a literal reading of the law, it should be sufficient that the income is in principle subject to foreign tax, regardless of whether this is in the hands of the Belgian individual who claims the reduction.

The third type is "miscellaneous income" such as occasional profits and gains that are "obtained" and "taxed" abroad.[70] The practical relevance is negligible.

2.3.2. DTT measures

Belgium provides for an exemption but the DTTs generally refer to the participation exemption and the FTC for dividends, interest and royalties. The applicable

58 Com. ITC, no. 155/15.
59 For an overview, E. Schoonvliet, "Binnenlandse vennootschappen met winst in het buitenland", *Vennootschap & Belasting*, Deel XIII, 2, 51–52.
60 Van Istendael, *op. cit.*, 212–213 and 217; Claeys Bouuaert, *op. cit.*, 39–40.
61 J. Defoort, "Verkenning naar de grenzen van het toepassingsgebied van artikel 88 W.I.B. inzake bezoldigingen" (1982), *Fiskofoon*, 102.
62 Art. 156, 2° ITC, last sentence.
63 Claeys Bouuaert, *op. cit.*, 43.
64 Cass., 15 September 1970, *Bull. Bel.*, no. 489, 1679.
65 Com. ITC, no. 155/20.
66 Q. & A., Senate, 14 February 1989, 913–914 (Q. no. 70 Cooreman).
67 L. Behaeghe, *De Fiscale Koerier* (1989), 173–174.
68 Hinnekens, *op. cit.*, 111.
69 Com. ITC, no. 155/20–22.
70 Art. 156, 3° ITC.

method will be determined by taking into account the nature of the income under domestic law.[71] For example, interest qualified as a dividend under foreign tax law will not be eligible for the participation exemption regime but for the FTC if it qualifies as interest in Belgium.[72] However, case law on the DTT with France has decided that a FTC on late interest payments is available because they qualify as interest under French tax law and the DTT.[73]

2.3.2.1. Exemption

The DTTs provide an "exemption with progression" for all income, except dividends, interest and royalties: in calculating the amount of tax on a resident's remaining income, the tax rate may apply which would have been applicable if that income had not been exempt. The law only applies it to Belgian individuals[74] and not to Belgian companies (the profit that is exempt is deducted from the net taxable basis).[75]

Belgium must exempt income which may be taxed in another state irrespective of whether it has effectively been taxed. However, a number of DTTs[76] contain a "subject-to-tax requirement" that needs to be satisfied.[77] The Supreme Court has confirmed that the exemption applies to the worldwide net taxable basis: income will only be exempt insofar as it is still included in that basis after deduction of expenses and compensation of the losses.[78] This is the *Velasquez* doctrine which was held incompatible with European law by the ECJ in the *Amid* case[79] and the *Mertens* case.[80] Most DTTs[81] contain a "recapture rule" for PE profits in certain circumstances.

Professional income which is exempt under a DTT may be taken into account for the computation of the municipal surcharges in the hands of a Belgian individual if it is provided for in the applicable DTT[82] (only the DTT with the Netherlands and Germany).

2.3.2.2. Participation exemption regime

For dividends, the recent DTTs provide that the regime will only be available under the conditions and within the limits provided for by law. However, some older DTTs contain an "equal treatment clause": Belgium must apply the regime to dividends paid by a company that is a resident of the other state to the extent

71 Com. DTT, no. 23/103 and 124.
72 J.F. Avery Jones, "Credit and exemption under tax treaties in cases of differing income characterization" (1996) ET, 123, 143 and 145.
73 Ghent, 6 March 2001, *Fisc. Int.*, no. 209, 6–7.
74 Art. 155 ITC.
75 Art. 76, s. 1, 1° RD/ITC.
76 For example, the DTT with the Netherlands.
77 Com. DTT, no. 23/112.
78 For example, Cass., 29 June 1984, FJF, no. 84/164.
79 ECJ, 14 December 2000, C-141/99.
80 ECJ, 12 September 2002, C-431/01.
81 Except the old one with Yugoslavia which currently still applies to Bosnia-Herzegovina, Macedonia and Serbia-Montenegro.
82 Art. 466bis ITC.

that it would have been applied if the two companies had been residents.[83] The practical relevance of this clause is essentially negligible as the law no longer makes a distinction between dividends paid by Belgian and foreign companies.[84]

2.3.2.3. Foreign tax credit

For interest and royalties, the recent DTTs refer to the conditions and limits provided for in the law under which the FTC is available.

Some older DTTs refer either to the law as applicable on the treaty date and taking into account subsequent changes that do not jeopardise the principle itself,[85] or to the law but specify a minimum rate equal to the actual foreign withholding tax,[86] while other DTTs contain a fixed minimum rate.[87]

The "subject-to-tax requirement" is set aside by the DTTs that contain a "tax-sparing clause":[88] Belgium is obliged to grant a FTC at a rate of typically 15 per cent or 20 per cent, even if the interest or royalty has not been taxed in the other state. In 1991, the Revenue announced renegotiation of all its DTTs containing a tax-sparing clause.[89] To date, such clauses have already been deleted in most DTTs.[90]

3. Belgian source income earned by non-residents

3.1. Principles

Non-residents are taxable on the income they have "derived" in Belgium.[91] The law does not define this term but contains a list of connecting factors which, for each type of income, determine when it is "derived" in Belgium.[92] Although the literal text of the law is not very clear, it is generally agreed that this list is exhaustive.[93]

In a DTT situation, the effective taxation of income "derived" in Belgium will only be possible if and to the extent that the right to tax this income is granted to Belgium.

The law does not apply different tax treatment depending on whether the non-resident who "derives" income in Belgium is resident in a "tax haven" or is not subject to a tax similar to that in Belgium.

83 For example, the DTT with Ireland.

84 For another point of view: F. Dierckx, "De D.B.I.-aftrek na het K.B. van 20 december 1996 en de dubbelbelastingverdragen" (1997) AFT, 484–489; Ph. Lion, M. Delattre and S. Douenias, "Het nieuwe D.B.I.-regime" (2003) AFT, 188 and 192.

85 For example, the DTT with the USA.

86 For example, the DTT with Italy.

87 For example, the DTT with France.

88 For example, the DTT with Greece.

89 A. Huyghe, "(Her)onderhandeling van dubbelbelastingverdragen", *Fisk. Int.*, no. 96, 7; Q. & A., Senate, 19 July 1994, 6229–6230 (Q. no. 674 Daerden).

90 For example, the DTT with Korea.

91 Art. 228, §1 ITC.

92 Art. 228, §2 ITC.

93 Ph. Hinnekens, *Belasting van niet-inwoners* (1994) Kalmthout, Biblo, 31.

3.2. Allocation rules and treatment[94]

3.2.1. Business profits

3.2.1.1. Allocation rule

A foreign company is liable to tax on all income attributable to a BE, including capital gains determined or realised, other than part of a qualifying reorganisation, on assets attributable to it.[95] All income attributable to a BE is considered business profit.[96] It is irrelevant whether the transactions leading to the profit of the BE were with residents or non-residents. Shipping and air transport profits are, on the basis of reciprocity, as a rule not taxable, even when realised through a BE. The profit realised by a foreign company (not being an insurer that usually collects insurance contracts other than re-insurance) is, on the basis of reciprocity, also exempt if obtained through a representative that acts as an order getter.[97]

A BE is defined as every permanent establishment with the aid of which a foreign enterprise (wholly or partly) conducts its business activities in Belgium.[98] This definition is similar to the general PE definition in the OECD model convention. However, there are a few important differences between a BE and a PE that weaken the importance of a fixed connecting factor with the Belgian territory. A building or construction project lasting for an uninterrupted period of more than 30 days forms a BE.[99] Each representative (other than an independent commercial intermediary acting in the ordinary course of its business) who is active for a non-resident in Belgium also constitutes a BE even if this representative does not have any authority to conclude contracts in the name of that non-resident[100] (except, on the basis of reciprocity, order getters). No exception for preparatory and auxiliary performances exists so that, for example, a storage facility and a stock of goods is considered a BE.[101] Every partner or member of a Belgian partnership, or a foreign partnership deriving profits or gains in Belgium, is deemed to have a BE or to carry on professional activities in Belgium.[102] Furthermore, in a few cases business profits are also taxable, even if they are not obtained via the intervention of a BE;[103] for example, income from the alienation or letting of Belgian situated immovable property, including the granting of rights *in rem*.

The source of the business profit is not relevant. Profit obtained abroad by a foreign company is also taxable to the extent that it has been derived as a result of the intervention of the BE.[104] However, income from and capital gains

94 Overview limited to the most important categories of income.
95 Arts. 228, §2, 3° and 231, §2 and §3 ITC. Exception: immovable property located in a third state.
96 Exception: capital gains realised on Belgian real estate.
97 Art. 231, §1, 3° ITC.
98 Art. 229, §1, s. 1 ITC.
99 Art. 229, §1, s. 2, 8° ITC.
100 Art. 229, §2 ITC.
101 Art. 229, §1, s. 2, 9° and 10° ITC.
102 Art. 229, §3 ITC.
103 Art. 228, §2, 3° ITC.
104 Com. ITC, no. 228/75–76.

realised on real estate forming part of the assets of a BE but located in a third state are taxable where it is located.[105] Foreign business profit received in Belgium but attributable to a foreign PE is not taxable.[106] As a rule, the law does not provide tax relief for profit obtained and taxed abroad but attributable to a BE. Such profit is taxable as "Belgian source profit". However, dividends (and capital gains on shares), interest and royalties can be considered "foreign source income" for the application of the participation exemption regime or the FTC. Thus, the same income can be considered either "Belgian source" or "foreign source" depending on the applicable rules. Some DTTs contain an equal treatment clause (dividends) and/or a tax-sparing clause (interest/royalties). However, these DTTs only apply to a Belgian company and not to a Belgian PE. Based on the judgment of the ECJ in the *Saint Gobain* case,[107] arguably, a Belgian PE of an EU resident company should also be entitled to invoke the equal treatment clause and the tax-sparing clause under the DTTs.[108] The practical relevance is, however, limited given the current negligible importance of an equal treatment clause, and because the DTT with Greece, which is currently being renegotiated, is the only DTT with an EU Member State that still contains a tax-sparing clause.

It is accepted that a BE cannot itself have a foreign establishment because an establishment is deemed to depend directly on the head office. If a foreign PE exists under the DTT with the state where the head office is based, and the foreign profit is attributable to that PE, it would not be taxable in Belgium.

3.2.1.2. Treatment

A BE is taxed on a net basis determined in the same way as for Belgian companies. However, under certain conditions, a lump sum taxable basis with an absolute minimum is provided for[109] and in a few cases a wage withholding tax is levied which constitutes the final tax burden.[110]

The law only allows for the deduction of costs which exclusively relate to the profit taxable in Belgium.[111] There is no reference to source but only to a connection with the profit to which the foreign company wants to attribute the expense. It is therefore irrelevant whether these costs have been paid by the head office, a foreign establishment or the BE (notional allocation).[112] This is in line with the DTTs. No deduction is allowed for part of the general administrative expenses but the Revenue makes an exception for the cost of controlling the BE and worldwide publicity costs.[113] In a DTT situation, however, a BE is entitled to a related part of the general administrative expenses allocated on the basis of factors such as turnover or gross profit, depending on the nature of the activities.[114] The law

105 Claeys Bouuaert, *op. cit.*, 40.
106 Van Istendael, *op. cit.*, 227.
107 ECJ, 21 September 1999, C-307/97.
108 G. Joseph, *De Fiscale Koerier* (1999), 635.
109 Art. 182 RD/ITC.
110 Art. 87, 5°, (c) and (e) and 87, 7° RD/ITC.
111 Art. 237 ITC.
112 Com. ITC, no. 235/37.
113 Com. ITC, no. 235/38.
114 Com. DTT, no. 7/334.

will determine whether or not costs attributable to the BE are actually tax deductible.[115] Generally speaking, the deductible expenses are not restricted to those expenses that have been paid to residents. However, as is the case for Belgian companies, pension payments are only tax deductible if paid to a Belgian insurer/pension fund or a BE of a foreign insurer/pension fund,[116] while the localisation of, and the tax regime applicable to, a non-resident recipient can be relevant for the deductibility of payments, for example.

3.2.2. Dividends, interest and royalties

3.2.2.1. Allocation rule

The law provides for two connecting factors.[117]

First, the income is taxable if it is at the expense of a debtor that is either a resident, a BE of a non-resident or the state or one of its political subdivisions. The Revenue interprets "at the expense" as either "payable" (dividends), or "the issuance of securities" (interest) or "paid" (interest and royalties).[118] Thus, unlike the DTTs, a notional allocation does not seem to apply. It may be said that the notion "at the expense" should be interpreted in the same way as the notion "paid or attributed" for the purpose of withholding tax because taxation takes place under the form of a final withholding tax.

Secondly, dividends, interest and royalties at the expense of a non-resident that does not have a BE to which the income generating assets belong are also taxable if they are received in Belgium by the foreign recipient. Investment income is considered "received" in Belgium if the material payment takes place in Belgium, for example, interest collected via a resident intermediary.[119] In a DTT situation, this connecting factor should be set aside.

For dividends, the rules apply regardless of whether they are paid to a parent or a portfolio shareholder. For interest, the place where the principal is made available and the residence of the bank through which it is paid is not relevant. Rental payments for equipment are also subject to the above allocation rules, regardless of where the equipment is used.

Belgium does not tax movable income at the expense of a non-resident and paid to another non-resident on the basis that the income originates from profits arising in Belgium.

Dividends, interest and royalties attributable to a BE of the recipient are treated as business profit.

Interest and royalties are not taxable if they are (a) allocated to the results of an establishment the Belgian debtor (other than the state or its political subdivisions) has abroad, and (b) not received in Belgium by the recipient.[120] Arguably, a notional allocation does not apply.[121] Income derived from foreign movable

115 Com. DTT, no. 7/333.
116 Administrative exceptions exist.
117 Art. 228, §2, 2° ITC.
118 Com. ITC, no. 228/9.
119 Com. ITC, no. 228/8 and 228/10.
120 Art. 230, 1° ITC; Com. ITC, no. 261/193.
121 Com. ITC, no. 230/3.

property which is deposited in Belgium and the income obtained as a result of transactions with that property is also exempt if the deposit and the transactions satisfy certain conditions, and to the extent that the depositor does not use the property for the carrying on of a professional activity in Belgium.[122] "Foreign movable property" is not defined but it is reasonable to qualify it as such if the debtor is located abroad.

3.2.2.2. Treatment

The tax liability is restricted to withholding tax of 25 per cent or 15 per cent on the gross amount, except where a reduction or exemption under a DTT or an exemption under domestic or European law applies.

A resident debtor must levy withholding tax when the income is paid or attributed.[123] The notion of "attribution" indicates the date as of which the recipient can actually dispose of or receive the income.[124] The date on which the recipient actually collects the income is irrelevant.

A non-resident debtor is obliged to levy withholding tax if the interest and royalties are allocated to the results of its BE (dividends cannot be at the expense of a BE).[125] The income is deemed "allocated" to the BE when it actually pays or attributes the income. In the case of actual payment or attribution by the foreign head office (or a non-BE), "allocation" is also deemed present if either the foreign head office (establishment) recovers the income from its BE, or the income is deducted as an expense from the BE's taxable basis.[126] Case law has confirmed that withholding tax is also due when the income is only treated as an expense of a BE for accounting purposes, even when no actual deduction is made from Belgian taxable profit.[127] This could be interpreted as if a notional allocation applies. However, arguably, such an interpretation would be inconsistent with the interpretation of "at the expense". The Revenue assumes that "payment or attribution" is deemed to take place on the last day of the taxable year during which the income is allocated to the results of the BE.[128]

Foreign income that is taxable because it is received in Belgium is subject to withholding tax to be levied by the resident intermediary[129] but only when, for example, the income is paid into an account the recipient has at its disposal.[130]

In the same situation as for Belgian companies, the law exempts certain interest payments and royalties from withholding tax if received by a BE (not being a "financial institution or assimilated").[131]

122 Art. 230, 2° ITC.
123 Arts. 261, 1° and 267, s. 1 ITC.
124 Cass., 28 February 1974, Arr. Cass. (1974), 721.
125 Art. 261, 1° ITC.
126 Com. ITC, no. 261/27.
127 Cass., 20 June 2002, *Fisc. Int.*, no. 226, 3–4.
128 Com. ITC, no. 261/36.
129 Art. 261, 2° ITC.
130 Com. ITC, no. 261/41.
131 Special rules exist.

3.2.3. Employment income

3.2.3.1. Allocation rule

The law provides for two connecting factors[132] for employees and company directors.

The first one is identical to that applicable to, for example, dividends: the income should be at the expense of a debtor that is, for example, a resident or a BE. It also applies to pensions (other than government pensions) regardless of whether they relate to a former professional activity carried out in Belgium.[133] According to the Revenue, "at the expense" means that either the Belgian debtor deducts the employment cost from its income or the foreign debtor recharges the employment income to, for example, a Belgian company.[134] Following the general position under the DTTs, it may be assumed that an indirect recharge of the income is not sufficient to trigger a tax liability. Unlike the DTTs, the Revenue does seem to require an actual tax deduction (no notional allocation). Arguably, income paid by a Belgian company but recharged to a foreign company in the framework of a temporary assignment of a foreign individual should not be taxable.[135] No conditions are imposed with respect to the localisation of the employer,[136] the place of employment or where the income is actually paid, or the duration of a physical presence in Belgium.

In most situations the allocation rule is in line with article 15 OECD model convention. However, the "183 days rule" refers to income paid by or on behalf of an employer. Therefore, employment income paid by a Belgian company that cannot be considered an "employer" in the sense of article 15 will not be taxable (assuming the employee is not present in Belgium for more than 183 days). The allocation rule will also not apply to pensions if a DTT exists which follows the OECD model convention.

The second connecting factor relates to income at the expense of a non-resident debtor regarding the carrying on of professional activities in Belgium by an individual physically present in Belgium for more than 183 days during the calendar year.[137] A discrepancy exists here with mainly the recent DTTs because they grant authority to the work state to tax the income of an employee that is present for a period or periods exceeding 183 aggregate days in any consecutive 12-month period commencing or ending in the fiscal year concerned. Neither the place where the income is paid or attributed nor the place where the income is deducted is relevant.

No tax liability occurs for remuneration of which a resident is debtor (other than the state or its political subdivisions) insofar as it remunerates a professional activity carried out outside Belgium by the recipient and is allocated to the results of an establishment located abroad,[138] even if the salary is paid in Bel-

132 Art. 228, §2, 6° and 7° ITC.
133 Art. 228, §2, 6° ITC.
134 Com. ITC, no. 228/89.
135 Hinnekens, *op. cit.*, 79–80.
136 It might be different for employees of transport firms and specific payments, for example, non-competition remuneration.
137 Com. ITC, no. 228/93.
138 Art. 230, 3° ITC.

gium. In a DTT situation, the exemption should also apply if no allocation is made. It is not required that the establishment be located in the country where the recipient carries on the activity so that the exemption cannot be deemed to contain a source rule. No exemption applies for remuneration paid by an employer that does not conduct an enterprise. The Revenue specifies that the remuneration must be part of the expenses of the foreign establishment and, consequently, must reduce its taxable result (no notional allocation) and seems to require a "subject-to-tax" that is not provided for by law. The exemption does not apply to pensions and is limited, according to the Revenue, to income that remunerates an actual activity (not, for example, severance payments).[139]

3.2.3.2. Treatment

Employment income is taxed on a net basis against the same progressive income tax rates as Belgian individuals (but increased by a 7 per cent fixed surcharge).[140] However, the law distinguishes between different categories of foreign individuals and the exact treatment depends on the category to which the individual belongs:

(a) a "permanent home" during the entire taxable period;
(b) no "permanent home";
(c) no "permanent home" during the entire taxable period but professional income obtained amounting to at least 75 per cent of the total professional income;
(d) no "permanent home" but "preferred" on the basis of a DTT.

Unlike individuals of (b), individuals of (a) and (c) are entitled to (almost) the same personal allowances as Belgian individuals. However, alimony payments are only deductible if paid to a resident. As for residents, the deductibility of gifts is restricted to payments to qualifying Belgian institutions[141] and tax reductions for the payment of, for example, life insurance premiums only apply if they are paid to a Belgian insurer/pension fund or a BE of a foreign insurer/pension fund.[142] Individuals of (c) cannot benefit from the housing deduction.

The personal allowances that individuals of (d) can claim will depend on the wording of the DTT. Some DTTs guarantee that, subject to certain conditions, a foreign individual will be able to benefit from the personal allowances in the same way as a Belgian individual.[143] Other DTTs strive for the granting of personal allowances in proportion to the share of the Belgian income within their global income,[144] but the wording in those DTTs is not the same.

Married individuals are treated as a single person if only one spouse obtains income that is taxable in Belgium while the other obtains either domestic professional income which is exempt by virtue of a DTT or foreign professional income

139 Com. ITC, no. 230/7.
140 Art. 80 RD/ITC.
141 Art. 241 ITC.
142 Art. 145/1, 2° ITC and art. 63/2, 1° RD/ITC. Administrative exceptions exist.
143 For example, the DTT with Greece.
144 The DTT with the Netherlands and the protocols to the DTTs with France and Luxembourg.

amounting to more than 8,030 euro. Increases of the personal allowances are only granted if the professional income of the spouse that is subject to Belgian tax is higher than the professional income of the other spouse.[145]

Under the same conditions as for Belgian individuals, employment income will be subject to wage withholding tax.[146] However, no withholding tax can be levied if the tax liability is based on a physical presence of more than 183 days.

3.2.4. Income from independent service providers

3.2.4.1. Allocation rule

The income is taxable if the service provider carries on professional activities in Belgium.[147] A Belgian fixed basis through which these services are provided is not required. However, without a fixed basis, Belgium will (as a rule) not be entitled to tax in a DTT situation. The place where the debtor is located and where the income is received, and the duration of the physical presence in Belgium, is not relevant.

3.2.4.2. Treatment

In principle, the same rules that apply to employment income are applicable. Income paid in the framework of the professional activity or the statutory or conventional purpose of the debtor is subject to wage withholding tax.[148] Income that is obtained as a partner of a Belgian partnership, or a foreign partnership deriving Belgian source gains, is subject to wage withholding tax similar to the ordinary progressive income tax rates.[149]

3.2.5. Income from artistes and athletes

3.2.5.1. Allocation rule

The income is taxable if it relates to a performance personally made in Belgium in the capacity of an artist or athlete. This is also the case even if the income is attributed to another individual or legal entity ("rent-a-star companies")[150] although Belgium is not allowed to tax such income under all its DTTs.

The rule applies regardless of how the profession is legally organised.[151] The duration of the performance, the place where the debtor is located and where the income is received, and the residence of the third party receiver are irrelevant.

145 Art. 244bis ITC.
146 Art. 87, 1° RD/ITC.
147 Art. 228, §2, 4° ITC.
148 Art. 87, 5° (b) RD/ITC.
149 Art. 87, 7° RD/ITC.
150 Art. 228, §2, 8° ITC; Com. ITC, no. 228/101.
151 Com. ITC, no. 228/97.

3.2.5.2. Treatment

An 18 per cent wage withholding tax will be due on the gross amount less a limited lump sum cost deduction[152] that constitutes the final Belgian levy.

3.2.6. Income from and capital gains on real estate

3.2.6.1. Allocation rule

For companies, the income and capital gains are taxable provided that the real estate is located in Belgium.[153] The presence of a BE is irrelevant. For individuals, the capital gains should relate to either qualifying land or qualifying buildings or should be speculative.[154]

3.2.6.2. Treatment

A real estate withholding tax may be due annually.

The tax liability for income is computed on a net basis against the ordinary tax rates. However, for individuals, the real estate withholding tax constitutes the final tax liability if the total amount of the income during the relevant year is less than 2,500 euro.[155]

The capital gains realised by a company are subject to wage withholding tax levied by the Notary Public. Any excess tax (for example if carried forward losses are available) can be refunded via the filing of a tax return according to the normal rules.[156] If the real estate constitutes a BE, no wage withholding tax will be levied but the normal rules of business profit apply. Individuals are taxed on a special net basis at a separate rate levied by the Notary Public via a wage withholding tax which constitutes the final tax due.[157] A speculative gain is also subject to wage withholding tax which is the final tax burden.[158]

3.2.7. Capital gains on shares

3.2.7.1. Allocation rule

For companies, capital gains are only taxable if they are attributed to a BE and the participation exemption regime does not apply.

For individuals, the capital gain is not taxable, except when (a) it is a speculative gain obtained or derived in Belgium,[159] or (b) it is a gain realised on a significant participation held in a Belgian company following a transfer to a foreign entity either directly or within 12 months following the transfer to a Belgian

152 Art. 87, 5°, (d) RD/ITC.
153 Art. 228, §2, 1° ITC.
154 Art. 228, §2, 9°, (g) and (i) ITC.
155 Art. 248, s. 2, 2° ITC.
156 Art. 210bis RD/ITC.
157 Art. 177 RD/ITC.
158 Art. 87, 5°, (a) RD/ITC.
159 Art. 228, §2, 9°, (a) ITC.

buyer[160] (a DTT will usually prevent such taxation); or (c) it is a gain realised within the framework of a professional activity carried out in Belgium.

3.2.7.2. Treatment

For individuals, a speculative gain is subject to wage withholding tax on the gross amount which is the final tax burden.[161] A gain on a significant participation is taxed on a net basis at a separate rate while professional gains are taxed at the ordinary progressive income tax rates.

4. Evolution of source and residence taxation

4.1. DTTs

4.1.1. General rule

Belgium seems to strike an overall balance between source and residence taxation which is more or less in line with the version of the OECD model convention that applied when the particular DTT was negotiated.

For example, the DTTs based on the 1977 OECD model convention allow for taxation in Belgium of income arising from performances carried out in Belgium by artists and athletes but paid to a "rent-a-star company", even if it is located in a third state and does not have a Belgian PE. Under the DTTs based on the 1963 OECD model convention, these companies were only taxable in Belgium if they had a Belgian PE to which the payment could be allocated.[162]

4.1.2. More source taxation

With respect to some types of income, Belgium sometimes seeks more source taxation than is generally allowed under the OECD model convention applicable at the time the DTT was negotiated. For example, a number of DTTs[163] attribute the right to levy withholding tax on all or some types of royalties paid to residents of the other state.

4.1.3. Less source taxation

Some DTTs have (potentially) less source taxation than what is generally allowed under the OECD model convention applicable when the DTT was negotiated. For example, most DTTs contain specific rules regarding remuneration received by a member of the board of directors in respect of day-to-day functions of a man-

160 Art. 228, §2, 9°, (h) ITC.
161 Art. 87, 5°, (a) RD/ITC.
162 Leuven, 5 October 2001, *Fisc. Int.*, no. 215, 1–3.
163 For example, the DTT with Latvia.

agerial or technical nature. Simply being appointed as a director to a company of another state is thus not sufficient to be taxable in that other state.

As a rule, the recent DTTs[164] and some older DTTs[165] provide for the application of article 15, including the "183 days rule". With respect to all other older DTTs, the Revenue holds that, in principle, article 14 applies.[166] A few older DTTs contain a specific clause for remuneration regarding daily activities carried out in a PE that is not located in the residence state of the director but in the other state: the right to tax is allocated to the PE state provided that the remuneration is borne as such by[167] or is attributed to[168] that PE.

4.1.4. Stricter conditions for exemption

Under some DTTs, the exemption is subject to stricter conditions than what is allowed under the OECD model convention, for example, a "subject-to-tax requirement" and a "recapture rule" for PE profits. These conditions can result in more residence taxation.

4.1.5. Application of anti-abuse measures

Unlike the OECD model convention, some DTTs have adopted wording to combat improper use which can result in either more residence taxation or a higher level of source taxation.

Some DTTs provide that no provision will be interpreted as preventing one of the states from applying the provisions of its domestic law for the avoidance of tax evasion and fiscal fraud.[169] According to the Revenue, this also applies to the DTTs that do not contain such a clause.[170] In addition, a couple of DTTs[171] contain a "limitation on benefits clause" under which a state must not grant a reduction from withholding tax on dividends, interest and royalties.

4.2. Domestic law

Since the beginning of the 1990s, there has been a growing trend towards more residence and source taxation.

For example, the conditions a Belgian company needs to satisfy to benefit from the participation exemption regime on dividends (and capital gains on shares) and the FTC on interest have become stricter: the participation exemption regime is only available if, among others, a subject-to-tax requirement is satisfied while the FTC applies in proportion to the actual tax levied abroad on the interest but is capped to a maximum of 15 per cent. The unilateral reduction to a

164 For example, the DTT with Finland.
165 For example, the DTT with the UK.
166 Ci. no. AFZ/Intern.IB/2002–0026 (AFZ 26/2002), 17 December 2002, *Bull. Bel.*, no. 834, 370–371.
167 For example, the DTT with Germany.
168 For example, the DTT with Greece.
169 For example, the DTT with Luxembourg.
170 Com. DTT, no. 28/17.
171 For example, the DTT with the USA.

quarter of the CIT that proportionally relates to profit obtained by a Belgian company in a non-DTT country has been abolished as of the 2004 tax assessment year. The connection factors for non-residents have been extended to allow Belgium to effectively levy tax in all cases where a DTT grants authority, such as the introduction of the "physical presence in Belgium for at least 183 days" factor for an employee. The scope of non-resident income tax has sometimes become broader than what is (generally) allowed under the DTTs, such as the taxation of capital gains realised by foreign individuals on the sale of a substantial participation in a Belgian company to a foreign company.

On the other hand, in the last couple of years, Belgium has introduced, subject to certain conditions, exemptions from withholding tax on certain interest payments to non-residents that do not use the movable property for the performance of an activity in Belgium.[172]

4.3. European law

Belgium was required to give up its taxation rights as a source state for dividends, interest and royalties.

As a result of the EU Parent–Subsidiary Directive, no withholding tax is due on qualifying dividend payments by a debtor that is a Belgian company as defined in that directive.[173] The exemption also applies to qualifying dividends that are paid by a Belgian company to an EU parent company but which are attributable to its BE or foreign establishment, even if located outside the EU.[174]

Under the implementation of the Interest–Royalties Directive, no withholding tax can be levied on qualifying interest and royalties by either a Belgian company or a BE. The exemption also applies to interest/royalties at the expense of a Belgian company but which are attributable to its foreign establishment, even if located outside the EU.[175] However, the practical relevance is limited as the law already exempts such payments from tax (and thus also from withholding tax) if they are not derived in Belgium by the recipient.

4.4. Alternative sharing

In the DTTs with the Netherlands[176] and Germany,[177] special compensation rules have been introduced for the budgetary impact of the allocation rights regarding employment income. In addition, the DTT with the Netherlands also provides special compensation rules in the Netherlands for Dutch individuals that are taxable in Belgium (compensation for the higher tax burden compared with the Dutch one) and for former Dutch frontier workers that are taxable in Belgium following the abolition of the frontier workers regime (compensation for the net loss of income).[178]

172 For example, art. 107, §2, 5°, (b) and 10° RD/ITC.
173 Art. 106, §5 RD/ITC.
174 L. De Broe, "Dividenden van Belgische dochters uitgekeerd aan vaste inrichtingen van EEG-vennootschappen", *Fisc. Int.*, no. 99, 1–3.
175 Art. 107, §6 RD/ITC.
176 Protocol II of the DTT.
177 Art. 3 of the additional DTT.
178 Art. 27 DTT (only applicable to certain income items).

Belgium has concluded a special agreement with Norway[179] and the United Kingdom regarding the transport of gas by pipelines.[180] Both agreements preclude Belgium from levying tax (under certain conditions) on, for example, all profits and capital gains related to the pipeline.

Résumé

La Belgique n'a pas mis au point une méthode générale (soit par voie législative, soit par voie jurisprudentielle) visant à déterminer la source géographique de l'imposition. Le droit fiscal belge ne définit pas la notion de *source* et ce terme n'apparaît que dans un article spécifique du Code belge de l'impôt sur le revenu.

Le droit fiscal belge distingue entre deux séries de règles de la source. En premier lieu, les règles de la source qui déterminent si les revenus générés par un résident de la Belgique remplissent les conditions requises pour un dégrèvement fiscal unilatéral: exemption de participation, crédit d'impôt étranger et réduction de l'impôt sur le revenu des personnes physiques à hauteur de 50 pour cent. En second lieu, les règles de la source qui déterminent quand les revenus générés par un non-résident de la Belgique sont imposables en Belgique. Les règles de la source sont, par exemple, "aux frais de" ou "l'exercice d'activités professionnelles". La raison d'être juridique de ces séries de règles est fondamentalement différente. La première est censée exclure les revenus du champ d'application de la fiscalité belge tandis que la seconde vise à les y inclure. Le pays déterminé dans lequel les revenus sont générés n'est, d'une manière générale, pas tellement important au regard de la première série de règles tant que la localisation est à l'extérieur de la Belgique. Les règles de la source de la seconde série sont plus larges pour certains types de revenus que les règles de la source de la première série. Nonobstant les considérations qui précèdent, on peut soutenir que les différentes règles de la source devraient être autant que possible interprétées de la même façon, dans la mesure où le texte de la loi le permet, indépendamment de leur fondement juridique. La règle de la source précise applicable dans chaque série dépend également dans une large mesure de la caractérisation du revenu. Par exemple, les intérêts à la charge d'un débiteur qui est un non-résident de la Belgique encaissés par une société qui est une non-résidente de la Belgique à travers son établissement belge seront imposés comme bénéfices commerciaux de source belge. Néanmoins, aux fins de dégrèvement fiscal, ils seront considérés comme des revenus de source non belge.

Des références à la "source" figurent également dans quelques autres dispositions fiscales belges; toutefois, en règle générale, ces références n'ont pas un sens particulier.

Le droit fiscal belge ne contient pas de règles particulières pour déterminer quand les revenus ont leur source dans un autre pays aux fins du dégrèvement fiscal dans le cadre d'une convention de double imposition.

179 Agreement of 14 April 1988 between the government of the Kingdom of Belgium and the government of the Kingdom of Norway relating to the transmission of gas from the Norwegian continental shelf and from other areas by pipeline to the Kingdom of Belgium (Law of 19 September 1991, Official Gazette, 20 September 1993).

180 Agreement of 10 December 1997 between the government of the Kingdom of Belgium and the government of the United Kingdom of Great-Britain and Northern Ireland relating to the transport by pipeline of gas between the Kingdom of Belgium and the United Kingdom of Great Britain and Northern Ireland (Law of 26 June 2000, Official Gazette, 12 September 2002, 2nd edn.).

La Belgique semble trouver un point d'équilibre global entre l'imposition à la source et l'imposition dans le pays de résidence qui concorde plus ou moins avec la version du modèle de convention de l'OCDE applicable lors de la négociation de la convention de double imposition particulière. Néanmoins, s'agissant de certains types de revenus, la Belgique insiste parfois davantage sur la retenue à la source tandis que, pour d'autres types de revenus, certaines conventions de double imposition prévoient (potentiellement) moins d'imposition à la source. En outre, aux termes de quelques conventions de double imposition, l'exemption est soumise à des conditions plus strictes, alors que d'autres conventions de double imposition contiennent des mesures de lutte contre les abus pouvant entraîner soit une imposition plus lourde dans le pays de la résidence, soit un taux plus élevé de la retenue à la source.

Le droit fiscal interne belge a accusé une tendance croissante à alourdir l'imposition du pays de la résidence et la retenue à la source depuis le début des années 1990.

Zusammenfassung

In Belgien besteht weder durch Gesetzgebung noch durch Fallrecht ein allgemeiner Grundsatz für die Bestimmung der geographischen Steuerquelle. Das belgische Steuerrecht liefert keine Definition des Begriffs "Quelle", der nur in einem einzigen Paragraphen des Einkommenssteuerrechts Erwähnung findet.

Das belgische Steuerrecht unterscheidet zwei Kategorien von Regeln zur Bestimmung der Einkommensquelle. Erstens gilt es zu bestimmen, ob Einkünfte eines in Belgien Ansässigen für eine unilaterale Steuerbefreiung in Frage kommen: Beteiligungsbefreiung, Anrechnung ausländischer Steuern und Ermässigung der persönlichen Einkommensteuer um 50 Prozent. Zweitens gibt es Vorschriften zur Bestimmung der Quelle, in denen festgelegt wird, inwieweit Einkommen eines nicht in Belgien Ansässigen der belgischen Steuer unterliegt. Die Quellenvorschriften lauten zum Beispiel "zu Lasten von" (*at the expense of*) oder "die Fortführung der Berufstätigkeit" (*the carrying on of professional activities*). Diese beiden Typen von Vorschriften beruhen auf völlig verschiedenen gesetzlichen Grundlagen. Mit dem ersten Typ sollen Einkünfte der belgischen Besteuerung entzogen werden, während die zweite Art darauf abzielt, bestimmte Einkünfte der belgischen Besteuerung zu unterwerfen. Für den ersten Typ Vorschriften ist das Herkunftsland der Einkünfte nicht Ausschlag gebend, sofern die Einkommensquelle nicht in Belgien liegt. Die Vorschriften des zweiten Typs sind weniger präzise und eng definiert und gelten für bestimmte Einkommensarten. Unbeschadet dieser unklaren Ausführungen, sollten die unterschiedlichen Vorschriften zur Einkommensquelle in gleicher Weise ausgelegt werden, soweit es der Gesetzeswortlaut unter Beachtung des gesetzlichen Grundprinzips gestattet. Welche Vorschrift innerhalb der einzelnen Typen Anwendung findet, hängt weit gehend auch von den Merkmalen und Kriterien ab, die das jeweilige Einkommen erfüllen muss. So werden beispielsweise Dividenden, die ein nicht in Belgien ansässiges Unternehmen einem ebenfalls nicht in Belgien ansässigen Unternehmen durch seine belgische Niederlassung auszahlen lässt, als Geschäftsgewinn aus belgischer Quelle besteuert. Geht es jedoch um eine Steuerbefreiung werden diese Einkünfte als Einkommen aus nicht-belgischer Quelle betrachtet.

Verweise auf "Quelle bzw. Herkunft" finden sich auch in einigen anderen belgischen Steuervorschriften. In der Regel handelt es sich dabei jedoch nicht um eine spezifische Bedeutung des Begriffs.

Das belgische Steuerrecht umfasst keine besonderen Bestimmungen darüber, welche Einkünfte aus einem anderen Land stammen, wenn es um Steuerbefreiung aufgrund eines Doppelbesteuerungsabkommens geht.

Belgien sucht nach einer ausgewogenen Lösung zwischen Quellen- und Ansässigkeitsbesteuerung, die mehr oder minder mit dem OECD-Musterabkommen übereinstimmt. Dieses Musterabkommen diente als Grundlage für die einzelnen Doppelbesteuerungs-

abkommen. Im Hinblick auf einige Einkommensarten tendiert Belgien jedoch gelegentlich zu verstärkter Quellenbesteuerung. Ausserdem gelten für die Ausnahmen in einigen Doppelbesteuerungsabkommen strikte Voraussetzungen, während andere Abkommen Massnahmen zur Verhinderung von Missbrauch enthalten, die entweder zu verstärkter Ansässigkeitsbesteuerung oder zu höherer Quellenbesteuerung führen.

Im belgischen Steuerrecht zeichnet sich seit Beginn der 90er Jahre eine zunehmende Tendenz zu verstärkter Ansässigkeits- und Quellenbesteuerung ab.

Resumen

Bélgica carece de un método general (legislativo o jurisprudencial) para determinar la fuente geográfica de la imposición. El derecho tributario belga no define el concepto "fuente", término que sólo aparece en un artículo específico del Código del Impuesto sobre la Renta.

El derecho tributario belga distingue dos series de normas de la fuente. En primer lugar, aquellas que determinan si las rentas obtenidas por un residente belga cumplen las condiciones requeridas para la desgravación fiscal unilateral: exención de participación, crédito de impuesto extranjero y reducción del impuesto sobre la renta de las personas físicas al 50 por ciento. En segundo lugar, las que determinan cuándo tributan las rentas obtenidas por un no residente. Las normas de la fuente son, por ejemplo, "a expensas de" o "el ejercicio de actividades profesionales". La razón jurídica de estas series de normas es básicamente diferente. La primera excluye las rentas del ámbito de aplicación de la fiscalidad belga, mientras que la segunda trata de incluirlas. En la primera serie de normas, el país en que se obtienen las rentas no es, en general, tan importante como que su localización se sitúe fuera de Bélgica. Las reglas de la fuente de la segunda serie son más amplias para determinados tipos de renta que las de la primera serie. No obstante lo dicho, se puede afirmar que, con independencia de su fundamento jurídico, las diferentes reglas de la fuente deberían interpretarse de la misma forma, en la medida en que el texto legal así lo permita. La precisa regla de la fuente aplicable en cada serie depende también en gran medida de la caracterización de la renta. Por ejemplo, los intereses a cargo del deudor no residente en Bélgica percibidos por una sociedad también no residente por medio de su establecimiento belga tributarán como beneficios empresariales de fuente belga. Sin embargo, se considerarán como rentas de fuente no belga a efectos de la desgravación fiscal.

También hay referencias a la "fuente" en otras disposiciones tributarias belgas; no obstante, en general, no tienen un sentido particular.

El derecho tributario belga carece de normas específicas para determinar cuándo las rentas son de fuente extranjera a efectos de la desgravación fiscal prevista en el convenio de doble imposición.

Bélgica parece haber encontrado un punto de equilibrio entre la imposición en la fuente y la tributación en el país de residencia concordante, en mayor o menor medida, con la versión del modelo de convenio de la OCDE aplicable en la negociación de un determinado CDI. No obstante, se insiste más, en determinados tipos de renta, en retener en la fuente, mientras que, para otros, algunos CDI prevén (potencialmente) menor tributación en la fuente. Además, en unos CDI la exención está sujeta a condiciones más estrictas, mientras que otros contienen medidas de lucha contra los abusos que pueden dar lugar a una mayor carga fiscal en el país de residencia o a un tipo más alto de retención en la fuente.

Desde principios de los años noventa, el derecho tributario interno mantiene una tendencia creciente a aumentar la tributación de la residencia y la retención en la fuente.