INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

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National Report of Belgium

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INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: Smith-Jones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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1. Private Clients

General comment: the overview and the answer on questions given, does not serve as an advice, nor can it be seen to be exhaustive. It serves as a thorough, though prima facie guideline into the Belgian legal and tax framework. This publication has been prepared for general guidance on matters of interest only.

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Belgium has no trust legislation in place. Some legal authors nonetheless argued in the past that the introduction of the trust legal form could improve shortcomings in Belgian private law[2]. Other authors fiercely argued against the use of foreign trusts by Belgian residents[3]. Until now, trust as such has not been implemented and no legal initiatives are pending.

Since 2004, foreign trusts are recognisable in Belgium for private international law purposes (Articles 122 to 125, International Private Law Code, (IPLC)). This legal change, as well as migration of families with anglo-saxon background, increased the acceptability of trusts in Belgium law. Mainly due to the uncertain tax consequences, trusts are however not actively advised as an asset or wealth protection structure.

Besides uncertain tax consequences, Belgian forced heirship rules also have to be taken into account. If Belgian inheritance rules apply (geenrally when the deceased had his residence in Belgium), protected heirs (that is, descendants, ascendants or the surviving spouse) can claim a reduction of the funds being transferred to the trust, as this transfer is generally regarded as a gift/transaction without consideration. The impact of the Regulation (EU) No 650/2012 (regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession) is to be analyzed here too.

Certainly, doubts can be expressed on the practical possibility to enforce a cliam an heir might have towards a trust in an off shore jurisdiction. Some

[2] M. Storme, “Vertrouwen is goed, dual ownership is beter: elf essentialia bij de invoering van een trustachtige figuur of fiduciare overeenkomst in het Belgische recht”, Rechtskundig weekblad - ISSN 1782-3463 - 60(1996/1997), p. 137-154

[3] A. Verbeke, “Trusts in België: liaisons dangereuses”, *TPR 2012*,

settlors also consider or effectively implement clauses which limit the claim an heir might have to his hereditary portion if he decides to execute his entitlement under Belgian inheritance law (penal clause). Also, it is not clear to what extent foreign courts will recognize the claim of Belgian heirs. In practice, it is however not actively advised to set up trusts for asset protection purposes in this context (e.g. avoidance of Belgian forced heirship rules) given the legal and tax uncertainties this this might entail.

The legal and tax consequences of a foreign trust are indeed complex and uncertain. Case law is scarce. A Belgian court decided in 1994 that a trust settlement cannot breach forced heirships' rights. A Belgian judge can recognise forced heirship claims against trust assets (Article 124(3), International Private Law Code (IPLC)), even if the law applicable to the trust provides otherwise.

On the other hand, it is commonly accepted that a genuine transfer of assets into trust has to be accepted and that the assets in principle will no longer be part of the private estate of the transferor. This might aid the settlor who wants to avoid claims from creditors, if timely implemented ("fraudulent transfer" evidently has to be avoided).

As far as the tax consequences of trusts are/were concerned in Belgium, one basically had to determine whether (Belgian resident) settlors or beneficiaries had a claim towards trust assets and the income thereon or not. Several legal authors have tried to analyze the tax consequences of trusts from a Belgian perspective, but their conclusions often remained ambiguous. The Tax administration (often the 'Special Tax Investigation Squad') generally claimed that trusts constituted sham under Belgian fiscal law in any event. The difficult assessment on the claim a settlor or beneficiary could have, over time could however be made 'in consultation with' the Belgian Ruling commission also. Thereby, the Ruling Commission for instance confirmed that beneficiaries of a *discretionary trust*[4] could not be taxed on distributions, since any entitlement originated from autonomous decisions by a trustee. If a trust was deemed to create a *fixed-interest* , this could trigger a taxation as 'interest' or 'life annuity' on behalf of beneficiaries. Some of the decisions by the Ruling Commission at least clarified some of the uncertainties in the field of trust taxation in Belgium, both for income taxes as for inheritance taxes.

More recently, the Program Law of 10 August 2015 introduced a so-called "look-through tax" or "cayman tax" for income received or distributed by certain legal arrangements, as from 1 January 2015. Trust will generally be an in scope legal arrangement[5]. Thereby it remains to be seen whether Cayman Tax

[4] Which was not only to be ruled upon according to the applicable trust law. Besides the stipulations in the trust deed, one had to take into account several factual circumstances also, such as whether or not a letter of wishes was drafted (and which provisions it contained), whether a protector was appointend or not, …

[5] The tax law withheld the legal definition of a trust withheld in Belgian International Private Law (BIPL - in itself inspired by the The Hague Convention). BIPL however basically applies to "anglo-saxon" trusts where there is a clear scission the trustee's assets and the trust's assets. It is not clear to what extent the BIPL-definition will limit the fiscal definition for purposes of the Cayman Tax.

will be the only scheme to evaluate the tax consequences of trusts in Belgium or whether the old analyses on discretionry versus fixed-interest nature of the trusts remain valid. Cayman Tax in any event does not apply in inheritance taxes (e.g. contrary to the Dutch APV-legislation).

The income of the assets owned by the legal arrangements in scope of Cayman Tax, is taxable in the hands of a Belgian private individual (being the founder or beneficiary of the legal construction), as if the Belgian individual would have received the income directly. Thus, this "look-through tax" considers these legal arrangements as tax transparent (e.g. a dividend received by the trust will be taxed transparantly in the hands of, *in principle*, the settlor at a rate of 27% (tax year 2017). It is not yet clear how the tax will work out in practice. Notwithstand the many uncertainties, it could however have as a benefit that a more clear tax treatment for trust assets and income can be developed in the coiming years than in the past where no specific legislation existed.

The law thus distinguishes two types of legal arrangements:

Trusts and other fiduciary relationships without legal personality (type a).

Low or non-taxable legal entities with legal personality (effective tax rate < 15% as 'determined on the basis of Belgian corporate/legal entities income tax) (type 2).

For the second category, two lists with the legal arrangements in scope were published via Royal Decrees:

The first (exhaustive) list mentions the EEA legal arrangements in scope: the Liechtenstein Stiftung, the Liechtenstein Anstalt and the Luxembourg Société de gestion de Patrimoine Familial. In the meantime the list was widened and also contains an anti-abuse provisions aiming to transparantly tax income obtained by entities for collective investment (to be awaited what the impact will be - the first legal commentators claim that this will bring joint investments by 'connected' wealthy family members in for instance the Luxembourg sicav-(sif) in scope of Cayman Tax), by Luxembourg SECS (obtaining Belgian source income) and even… the not yet implemented Luxembourg foundation.

The second (non-exhaustive) list mentions the non-EEA legal arrangements in scope (BVI, Panama, …)

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

The Act of 2 May 2002 introduced the Belgian private foundation. A foundation is created by way of a legal act and does not have any shareholders (unlike a Belgian company) or members (unlike a Belgian not-for-profit organisation). With this act one or more founders transfer property to a separate legal entity designated to pursue a specific altruistic/disinterested purpose. The foundation is often implemented to hold artworks, to aid disabled persons, to protect the interest of a familial enterprise,…

The foundation cannot provide any economic benefit to its founders and directors or to any other person, unless this is required by the realisation of its disinterested purpose. This structure only became available in 2003, and therefore its viability as an estate planning tool is not clear. For instance, some hesitations exists to fully implement the foundation for pure familial estate planning of for instance portfolio investments.

Nonetheless, the Belgian Ruling Commssion adopted quite a positive attitute towards the use of foundations in this respect. The Belgian Ruling Commission thus ruled on the tax treatment of distributions out of a Belgian private foundation (Ruling N° 2011.275 of 29 November 2011 and Ruling No. 2012.311 of 4 December 2012 and Ruling N°2015.593). These rulings concern income tax law and inheritance tax. In these particular cases the Ruling Commission decided that distributions to the beneficiaries are not subject to inheritance tax or income tax. In two other Rulings, the Ruling commission also did not object against a factsetting in which the 'grantor' (who was not the official 'founder') was also beneficary. This gives the impression that the Ruling Commission interpretes the rule that 'founders (or directors) cannot be beneficiary' quite strictly (and thus in favor of taxpayers). It remains to be seen whether this approach will remain followed in the next years.

Foreign foundations are recognisable in Belgium. Article 110 IPLC provides that bodies with separate legal personality are governed by the law of the State on the territory of which they had their main establishment since the time of the incorporation. If the foreign law refers to the law of the State under which the body with separate legal personality has been created, the latter will apply.

The Belgian Ruling commission issued interesting rulings in relation to the tax treatment of Liechtenstein foundations in the past years (ruling 2014.543 of December, 9, 2014). Thereby it confirmed that (depending on the constellation of facts) no inheritance taxes should be due upon distribution to beneficiaries from a discreionary *Stiftung*.

Both for foreign foundations as for the Belgian private foundatino, attention will have to be paid to forced heirship rules.

Given the 'continental' background of Belgium, the use of foundations is in any event more widely accepted and implemented than trusts. Foundations also could be useful in case a trusts would have to be dismanteled for some reason. The foundation could then, depending on the facts of the case, serve as beneficiary of the trust and allow for more commonly accepted estate planning for Belgian residents.

Cayman-Tax is also applicable for entities subject to legal entities taxation, such as the Belgian private foundation. This will have to be taken into account when a Belgian private foundation would be beneficiary or settlor of a foreign trust.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Introduction

Asset protection will generally coïncide with estate planning, whereby the balance has to be found between retaining control over assets and transferring them to the next generation. Often clauses in deeds of donation might remedy this, but are not sufficient in itself. A common estate planning technique in Belgium is thus to make lifetime gifts, especially if movable assets are concerned. By doing so it is possible to structure the estate in a way to allow the donor to retain the benefits (for example retention of the usufruct) and the control over the administration and management of the assets, whilst the (bare) property is transmitted to the beneficiary. Often tax transparent entities are used such as the société de droit civil / burgerlijke maatschap or the Dutch Stichting Administratiekantoor which allow the founders to organise control over the administration of the assets.

If the donation is done before a Belgian notary, then the flat rate gift taxes apply (see below). In case of a gift from hand to hand of tangible movable assets or by bank transfer, or of a donation made before a Dutch or Swiss notary, the gift taxes only apply in case of registration of the gift. If the donor deceases within the three years as from the date of the gift and no gift taxes were paid, the assets will be deemed to be a part of the estate for the calculation of inheritance taxes.

Besides estate planning, some of the vehicles also allow for scission of personal and business liabilities. For instance, a *pater familias* could consider to transfer assets into a foundation (with respect of Belgian foundation law) to separate these assets from his business assets. As a general rule, advice for these kind of transactions will be to a) keep it simple ('if you can't explain it, it will not work'), b) timely implement the structure, meaning before an actual claim arises, c) to not mingle personal assets and business assets (e.g. separate liquid assets in a corporate structure from the enterprise risk; separate assets that are no longer useful for the enterprises as a whole, from the group into a vehicle protecting personal assets), d) to keep a sufficient balance between control and transfering assets (in a donation context: '*donner et retenir ne vaut*').

Belgian civil partnership

The Belgian civil partnership is a planning instrument that is frequently used for the transfer of movable property to the next generation while maintaining control over the proceeds and investment policy of the assets. It is as such not an asset protection vehicle (the civil partnership has no distinct legal personality). The 'shareholders' will be fully liable for the debts of the civil partnership.

It however does allow for discretion in planning a transfer of assets to the next generation, together with the privacy guaranteed unter the Belgian final withholding tax rules in relation to Belgian source assets/income. The civil partnership is a regulated vehicle, though many arrangements can be left to the parties implementing the civil partnership.

The civil partnership agreement is generally entered into by the paterfamilias and his spouse or his children with whom they will pool the property or cash that they want to transfer. The civil partnership can easily be used for the transfer of shares of companies too.

The control will arise from the fact that the paterfamilias (and potentially the spouse upon his death) will be designated in the articles of association as the manager of the partnership. This allows him for instance to regulate the investment policy, which would be more difficult in a bare property-usufruct relationship on portfolio assets. Given the fact that unanimity is in general required to make any changes to the articles of association, it will be impossible to discharge the paterfamilias without his consent. The agreement will be effective in principle until the death of the paterfamilias and his spouse.

Dutch STAK

Belgian tax residents will often make use of a Netherlands incorporated foundation (stichting) as an asset protection vehicle. Generally such foundation is set up as a STAK (stichting administratiekantoor) holding shares of familial enteprises. Upon contribution of the assets to the STAK, the former holders of the assets receive depositary receipts issued by the STAK. Through this mechanism there is a clear separation of the voting rights and the beneficiary rights: the voting rights rest with the STAK, whereas the economic/beneficial ownership rests with the holders of the depositary receipts. This means that some of the features of a trust can be reached by making use of the more known STAK legal form.

A Belgian private foundation (as well as other corporate vehicles) also allow for certification, though preference is often given to the Dutch STAK (only one director needed, more flexible,…).

For Dutch tax purposes a STAK is in principle not subject to corporate income tax. In fact, the STAK is considered transparent for Dutch tax purposes so that any tax is levied at the level of the depositary receipt holders only. Also from a Belgian tax purpose, the STAK can be tax neutral (main condition to realize this is that income stemming from the shares held by the STAK is 'immediately' distributed to the holders of the depository receipts). Combination of the STAK and the higher mentioned civil partnership is possible too in a tax transparent manner (Ruling n° 600.439).

The STAK also allows for greater discretion, for instance by having it issued bearer depository receipts. The latter is no longer possible in Belgium since an act of December, 14, 2005.

Corporate vehicles

Corporate vehicles, either in Belgium, either abroad are frequently used be used too, mainly for 'holding purposes'. This could be the holding of shares, but also of real estate.

Belgian Private Foundation

A Belgian private foundation also allows for the separization of assets. The foundation could be used for familial assets upon conditions. As mentioned higher, certification is also possible. The Belgian Private foundation however requires at least 3 directors in the BoD.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

General

Belgium is not asset protection unfriendly. Commercial companies with limited liability generally have a legal personality different from the personality of their shareholders. The same applies for the Belgian private foundation. As a general rule, (corporate) shareholders of a Belgian company with limited liability are not liable for the debts of the company beyond their capital contribution[6]. Personal creditors are only entitled to the net-value represented by the shares held by the shareholder and thus cannot simply enforce their claims towards the entire company assets. Directors are not personally liable for the debts of the company.

The separation of assets thus allows shareholders/founders to safeguard their own private estate to a certain extent. Fraudulent transfer of course has to be avoided. One of course will also have to take into account the legal personality of the vehicle when using it. A shareholder for instance cannot use assets of a corporation with limited liability for its own use, unless this is properly accounted for in the books of the company. One thus cannot implement a vehicle (be it a corporation or foundation) and later on act *'as if the company/foundation does not exist'*. What certainly cannot be accepted is the case where a Belgian (or foreign) company is a sham as of its incorporation. This concerns the situation where parties pretend that they have incorporated a company and present to that effect a deed of incorporation to for instance the tax authorities, while in reality no such company has been formed between them. This is of course a case of blatant fraud involving forgery, and the tax authorities will not have to take into account the existence of this company.

[6] Some companies have legal personlity, though there is no limited liability.

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There are no rules dealing specifically with corporate veil piercing. There is for instance no definition of sham in the Belgian Civil Code (though the concept is commonly known). Nevertheless, there are certain limited exceptions to the general principle of limited liability. These are either derived from legal provisions of existing company and civil law (generally referred to as "legal piercing") or developed by Belgian courts, mainly in the context of the bankruptcy of a Belgian company or subsidiary (generally referred to as "judicial piercing").

Generally speaking, under the rules of Belgian international private law Belgium recognizes the distinct legal personality of a legal entity provided that it has been validly incorporated under Belgian law or under the laws of its principal establishment (which is the applicable conflict of laws rule under Belgian international private law) and that the entity enjoys a distinct legal personality under such laws. There is no need to comply with any further formalities to obtain that result under Belgian law. ('recognition de plano')

Tax

The former conclusion also applies for Belgian income tax purposes even if the foreign company[7] has been set up for tax avoidance purposes.

Belgian tax law is governed by private law to the extent that tax law does not explicitly or implicitly provide otherwise. The BITC (Art. 29 (2)) expressly allows the tax authorities to disregard the legal personality of certain Belgian companies (such as the higher mentioned 'civil partnership') and certain Belgian and non-Belgian legal persons for income tax purposes. As a result, the general rule that the legal personality of Belgian and foreign companies must be recognized for Belgian income tax purposes is set aside by this specific provision and the entities listed in that provision are treated as tax transparent. The scope of application of that provision is, however, very limited.

For the remainder, some important rules that have to be taken into account from a tax perspective when dealing with (foreign) structures are:

> the absense of *sham* according to tax law: sham implies a conflict between the intentions which parties outwardly express, but which are only apparent ones and conceal the parties' real intentions which they keep secret, sham involves the use of false or fraudulent acts and constitutes a form of tax fraud.
>
> On the other hand, the Belgian Supreme Court in its 1961 landmark decision in the Brepols-case held that: "There is no illegal sham, and consequently no tax fraud, where in order to enjoy a more favorable tax treatment the parties, using their freedom to contract, without however violating any legal obligation, enter into acts of which they accept all of

[7] The "de plano" recognition of a foreign legal person in the Belgian legal order is subject to a number of exceptions, i.e. the exception derived from the incompatibility with the international public policy and the one derived from the doctrine of "fraus legis".

the consequences, even if the form they give thereto is not the most usual one". The Supreme Court has confirmed this decision in identical terms in several subsequent cases. In a second landmark case Au Vieux Saint- Martin it added that its decision also holds "even if these acts are entered into with the sole purpose of reducing the tax burden". These Supreme Court decisions have solidly laid down the principle generally known in Belgian tax law as "the free choice of the least taxed road"[8].

The respect for the (tax) residence of the company: the determination of a company's residence for Belgian tax purposes is essentially a factual discussion dealing with the determination of the place from where the company is actually managed. To put it simple: holding portfolio investments through a Guernsey company is not forbidden for a Belgian shareholder. The legal nature of the company is respected, though if it would appear that all major shareholders / board of director decisions are being taken in Brussels, Belgium, this might render the company subject to Belgian corporate income tax and this might open a debate on whether or not the company is a sham or not.

Specific anti-avoidance provisions, particularly when dealing with foreign companies:

According to article 344 (2) BITC the transfer of assets by Belgian residents to non-residents established in a tax haven or a jurisdiction providing a preferential tax treatment can be disregarded. This provision produces effects that are to a certain extent similar to those of a CFC-rule.

Other provisions have to be seen in the light of transfer pricing: (Art. 26, Art. 207 and Art. 185 (2) BITC);

A general anti-abuse provision has been enacted in 2012: article 344 § 1 ITC'92. The provision can be set aside if there are other motives than pure tax motives.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

[8] L. De Broe, "INTERNATIONAL TAX PLANNING & PREVENTION OF ABUSE UNDER DOMESTIC TAX LAW, TAX TREATIES & EC-LAW", Doctoral Thesis, 2008.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

As a general remark, one will have to take into account the higher mentioned article 344 § 2 ITC'92 when dealing with foreign low taxed asset holding vehicles, be it a trust or a foundation. Certain transfers escape the application of this article. It is not always invoked by the tax administration due to its complexity too. As from tax year 2016, important attention will have to be paid to the application of Belgian Cayman tax, in case of Belgian resident settlors or 'third party beneficaries'.

Transfers into trust

Transfer into a foundation

Transfer of assets to a (Belgian) private foundation during the life of the settlor will generaly be deemed to be transfers without consideration. These can either be:

- Tax-free. This applies to transfers of movable property if the donor survives for three years after making a gift. The transfer can be either by hand/bank transfer, or by foreign notary deed (in case of which a three year delay needs to be taken into account to avoid inheritance taxes).
- At a flat gift tax rate of 5.5% (in Flanders), if the gift is voluntarily registered (which will automatically be the case for a Belgian notarial deed).

A Belgian private foundation can also be founded upon decease of the founder (foundation following notarial will). Taxation will be due at 8,5% in Flanders.

Private foundations are subject to legal entities' income tax, as opposed to corporation tax. Legal entities' income tax has a more limited tax base than corporation tax.

For distributions by a belgian private) foundation, see higher.

For foreign foundations, such as the Liechtenstein *Stiftung*, attention will have to be paid to the application of Belgian Cayman tax. A recent ruling did conform the non-application of inheritance on the occassion of the decease of a Belgian resident settlor of a discretionary *Stiftung* .

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

Introduction

The developments of the last years in the field of international exchange of information in (income) tax matters have had a great impact on Belgium. Traditionally, Belgium is a country that attaches great value to the (internal) banking secrecy, as a safeguard to protect the trust relationship a taxpayer has towards his or her bank. This trust relationship has to be protected, thereby at the same time taking into acount the fact that the tax administration may in a specific file have legitimate claims towards the taxpayer.

Belgium thus traditionally had a banking secrecy in income taxes. It was however not a banking secrecy that was protected by criminal law or the constitution and there were several exceptions possible (see hereafter).

Belgium showed little interest in the OECD-TIEA that was released in 2002 and (together with Luxemburg, Switzerland and Austria) objected against the proposal of the OECD in 2004 to insert a fifth paragraph in article 26 of the model-DTC imposing the exchange of information held by banks.

Also, Belgium (like Luxemburg and Austria) opted for a 'withholding tax' under the EU Savings Directive instead of effectively exchanging information on savings held with Belgian banks.

Change of the Belgian approach

A first breakthrough of the 'discrete Belgian approach' came in 2006, when Belgium signed a re-negotiated DTT with the USA. This DTT includes an article 26 § 5 DTT which allows for exchange of banking information upon request.

In general, the G20 summit in London in april 2009 is seen as the most important driver behind the increased awareness of exchange of information in tax matter as we know it today. This summit was very important for Belgium also.

At that time, Belgium was placed on the famous 'grey list' of countries not fully cooperative to implement/efectively use the 2009 OECD-standard for exchange of information in tax matters. Belgium only had the DTT with the US in place at that time. It had confirmed to be willing to implement the 2009-OECD standard but when the OECD-grey list was drafted, Beglium did not fully apply the standard.

Immediately after enactment of the OECD- grey list, Belgium withdrew its reservation for the OECD-standard and requested somewhat 110 states to modify the DTT in place at the time or to agree on a new DTT or TIEA (model 2002). Briefly thereafter, serveral agreements/protocols were signed. Effective implementation did however took a long time for many of the agreements, because the Council of State held that approval of those treaties belonged to the joint jurisdiction of the federal authorities, regions and communities because they (also) covered tax matters exclusive to each of them (see hereafter under 3 what the immediate impact for banking secrecy was in Belgium).

Belgium at that time also dropped the alternative regime of withholding at source for the country of residence permitted by the Savings directive and switched over to implementation of the ordinary EOI regime provided by the EU-savingsdirective (applicable since January, 1, 2010).

Belgium also actively particpated in the negotiation of the protocol amending the Convention on Mutual Administrative Assistance in Tax Matters of January, 25, 1988. The Protocol amends the Treaty to bring it in line with the OECD-standard and was signed by Belgium in 2011. It entered into force op April, 1, 2015 (though is only effectively applicable for income year 2016, tax year 2017).

Modifications to Belgian internal banking secrecy in income tax matters

As mentioned, Belgian bankers are not bound by professional secrecy, sanctioned by criminal law. They are however traditionally bound by a contractual duty of non-disclosure towards their customers.

In the past, this meant that the Belgian tax administration can audit banks (now as well as in the past), but not with the sole purpose to tax her clients. If information was gathered during a legit audit and tax fraud of (one of the) clients appeared from it, then the information could be used however. If however the tax administration would want to intentionaly do a tax audit with a bank while the rationale behind the audit is to tax or to audit individual clients, then the audit risks to be illegit (recently confirmed by the Court of Ghent; June, 11, 2013 - in a file where the lead tax inspector claimed to have indiciations that clients of the Belgian bank held undeclared life insurance contracts with a Luxembourg bank).

The banking secrecy is generally not valid when an assessed tax bill is being judget on its merits (tax reclamation, article 374 ITC'92), when taxes are being pursued (article 319bis ITC'92), in other tax matters than income taxes (VAT, inheritance taxes,…),…

a. Modifications to banking secrecy

Higher, we mentioned that Belgium proceeded to concluding several tax agreements on the exchange of information in tax matters as from 2009 to implement the OECd standard. Due to the fact that the Council of State was of the opinion that these threaties had to be implemented by federal and regional legislators, Belgium faced a negative peer review phase 2 examination by the OECD mid's 2012[9].

[9] A phirst phase peer review was positive.

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To remedy the slowness of the legislative process, the Belgian federal legislator decided to amend the internal banking secrecy and to not awaid the outcome of the ratification of numerous DTT's and TIEA's.

Initially, an amendment of the higher mentioned article 318 ITC'92 was envisaged in case a request for information was sent from a foreign country. This basically entailed that the tax administration could investigate clients of banks in case of international requests. The proposal was controversial from a discrimination point of view and finally, a proposal was made to insert a new article 322 ITC'92 alowing for abolishment of the banking secrecy a) in relation to tax investigation by the Belgian tax administration with Belgian banks and b) in relation to international requests[10].

Since the act of April 14, 2011 (mainly in force as from July 1, 2011), the tax authorities may (upon conditions[11]) ask a bank about one of its customers if a) they have reason to believe there has been fraud, b) they intend to adjust the taxpayers tax situation according to signs of wealth (e.g. the taxpayers buys a house in 2014 for a value of EUR 500.000, though only declares EUR 36,000 of labour income for the same year), c) if a request by a foreign country pursuant to an international agreement (DTT,…) has to be answered.

The Belgian tax administration does have to respect noticifation duties towards the taxpayer. This was initially not the case when a foreign country send a request for banking information of a taxpayer. This stipulation was however deemed to be unconstitutional by the Belgian Constitutional Court (May, 16, 2013). Since this decision and a legislative intitive (Law of December 21, 2013), the Belgian tax administration in general also has to inform a taxpayer when the request for banking information is issued by a foriegn country.

b. Introduction of a central contact service

In addition to the modifications on the banking secrecy, the act of April, 14, 2011 also provides for the creation of a central contact service ('Centraal aanspreekpunt') or 'point de contact central') held with the National Bank of Belgium to which banks, exchange, credit and savings institutions will have to report information on their curstomers' identities, account and contract numbers (article 322 § 3 ITC'92). Also, the numbers of foreign bank accounts have to be reported to this central contact service.

Important to note is that this 'central contact service' cannot be seen as a central databank containing an overview of all assets held by Belgian taxpayers. Accounts balances are for instance not registered in this register.

The tax administration has access to the central contact service upon conditions.

c. Most recent evolutions

[10] Act of 14 April 2001

[11] Not extensively addressed for the purpose of this report.

The Belgian political party CD&V (part of government) is considering abolishment of the remains of the Belgian banking secrecy. Their argument is amongst others that, the way in which the situation is currently evolving in international perspective, it could be the case that there will be less "secrecy" for (belgian resident) taxpayers doing investments abroad than there will be for taxpayers investing assets with Belgian banks. The latter can benefit from 'final withholding tax' (which allows for discretion, because this income does not have to be declared in the income tax return) as opposed to taxpayers having investments with foreign banks which would be automatically exchanged under CRS or EU Fatca. The Belgian residents would also have greater protection under the remains of the banking secrecy than foreign taxpayers, given that the tax administrations then a) needs to have reasons to believe there has been fraud, b) or has the intention to adjust the taxpayers tax situation according to signs of wealth (see higher). The latter will not always apply for foreign taxpayers.

A first proposal to automatically link the tax return to banking information, was however fiercely critized by legal commentators and liberal political parties.

The relationship with Switzerland and Luxembourg

Traditionnally, attention has to be paid to the impact of disclosure of banking information from Switzerland or Luxembourg. Several Belgian taxpayers held assets with Swiss or Luxembourg banks. This is as such not forbidden. To the extent Belgian tax residents would now still hold assets that are affected by underlying tax breaks (e.g. non-reporting of the existence of a bank account or non-reporting of income) in these countries, information exchange will have a major impact.

On April, 10 2014 Belgium and Switzerland signed an additional agreement with the DTT, which amongst other contains a provisions on the exchange of information (on request). It contains an administrative assistance clause in accordance with the current international standard for the exchange of information upon request. Thereby, exhcange of information can no longer be refused in case the information is held by a bank / finanacial institution. A comparable agreement was reached in 2009 and finalized in 2013 with Luxembourg.

Of course, Luxembourg (EU Fatca) and Switzerland (CRS) will adhere to automatic exchange of information, which will probably resulat in valuable information for the Belgian tax adminsitration. The Belgian Governement and legislator has the intention to enact legislation for voluntary disclosure, also taken into account the impact of international exchang of information in tax matters.

The Belgian practice on automatic information exchange in tax matters so far

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a. General overview

Since the turnover in 2009, Belgium adopted a positive atitude towards exchange of information. Serveral instruments now foresee in automatich exchange of information too.

The European Savings Tax Directive is applicable since 1 July 2005. As mentioned higher, Belgium applied a transitional regime from 1 July 2005 until 31 December 2009. During this period, Belgium applied a system of withholding tax, but as of 1 January 2010, banks must automatically exchange information on interest payments to beneficial owners (investors) resident in other EU Member States. As known, the savings directive is mainly repealed as from January, 1, 2016 following the further reaching procedures for exhcange of information under EU Fatca/CRS[12].

The European Mutual Assistance Directive of February 2011 is implemented in the Belgian legislation by article 338 ITC and foresees an automatic exchange of information of income from employment, directors' fees, attendance fees, income from life insurance, pensions and property income regarding taxable periods as from 1 January 2014.

On 29 October 2014, several countries (including Belgium) adhered to automatic exchange on the basis of the Common Reporting Standard (CRS).

In response to these separate multilateral treaties, the European Commission has tightened both the European Savings Tax Directive (amended by Directive 2014/48/EU and as mentioned), as the Mutual Assistance Directive (Directive 2014/107/EU). These new European rules are conform to the CRS, OECD and FATCA standards. Belgium will adhere to them too.

Belgium also has some administrative agreements in place which provide for automatic exchange of information (e.g. with France, The Netherlands, Italy,…).

Apart from clauses in DTT's/TIEA's and some administrative agreements, Belgium is thus embracing the higher mentioned initiatives in the field of automatic exchange of information in tax matters by adhering to the Common Reporting Standard, EU Fatca (Directive 2014/107/EU) and US Fatca.

b. Belgian implementation of automatic exchange of information instruments

The long awaited Belgian law of 16 December 2016 regulates the "communication of information relating to financial accounts by Belgian financial institutions and the Ministry of Finance in view of the automatic exchange of information on an international level and for tax purposes". It was published in the Belgian State Gazette on 31 December 2015.

[12] G. Verachtert, "Europese Spaarrichtlijn verdwijnt grotendeels per 1 januari 2016", Fiscoloog 1454, 8.

This act introduces the Belgian rules that are necessary to allow Belgium to comply with its obligations under

- the IGA to implement FATCA in Belgium ("Agreement between the Government of the Kingdom of Belgium and the Government of the United States of America (US) to Improve International Tax Compliance and to Implement FATCA" (IGA)), signed on 23 April 2014,;

- the Multilateral Competent Authority Agreement on automatic exchange of information, that will apply as of 2017; and

- EU Directive 2014/107/EU, amending the Mutual Assistance Directive on administrative cooperation in the field of taxation (2011/16), to be implemented on 31 December 2015 ; it will apply as of 2016.

The Act provides a framework obliging Belgian qualifying financial institutions and insurance companies to identify and verify account holders and their accounts, with certain due diligence duties and procedures, to exchange information automatically, to retain the information and protect the privacy of the personal data of the account holder.

This framework is heavily inspired by these three international instruments and makes, mainly in the annexes to the Act, the distinctions between Belgium's obligations under the FATCA Intergovernmental Agreement, the Multilateral Competent Authority Agreement on automatic exchange of information and Directive 2014/107/EU. The specific due diligence rules which qualifying financial institutions and insurance companies must comply with can be found in the annexes to the law.

The Act has entered into force as of 10 January 2016 for the banks' obligations under the FATCA Intergovernmental Agreement and under the EU Directive 2014/107/EU (that is the 10th day following publication in the Belgian State Gazette). As for the exchange of information with any other jurisdictions (mainly important for the CRS obligations), a royal decree will determine when the Act enters into force.

Key or remarkable points of the Belgian law are the following:

- If the foreign partner state has any doubts on the quality of the exchanged information, it can request the Belgian tax administration to verify the information with the competent Belgian bank;
- Belgian banks can make an appeal to third party service providers for collection of the data, though they remain responsible for the quality of the data;
- The Belgian tax adminstration is responsible for the audit of banks to see whether they respect the obligations under the act (which is not totally illogical but on the other hand, this would just be a compliance audit and thus not immediately relate to the perception of taxes which is of course the core business of the tax administration - to be verified

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how this interacts with the restriction for the administration to audit banks with a view on taxing their clients (see higher));

- Taxpayers will be informed about the fact that data will be transferred to the competent Belgian tax authority (article 14 of the law);
- Application of the law can be suspended when non-EU partner states prove not to maintain safeguards to protect privacy of Belgian taxpayers or do not sufficiently inform them that data on their behalf will be exchanged;
- One important feature is that the retention period for the financial data, as well as the period during which the Belgian tax authorities can investigate the communication of information is one year more than the standard period in the Income Tax Code to investigate (fraud) case (8 instead of 7 years, whereby 7 years is the delay in case of fraud - article 12 § 4 of the law). Moreover, the Act also obliges financial institutions and insurance companies to wipe out the data after this period;
- Quite severe sanctions (articles 18 and 19 of the law) are imposed if the financial institution would not (timely) report the information. Fines up to EUR 3.000.000 (criminal fine) are possible and financial institutions can (theoretically) be held liable for unpaid taxes by the client/taxpayer (whereby it however remains to be seen if this is a useful disposition, given that unpaid taxes will in principle relate to foreign taxes).
- The Belgian Privacy Commission had some serious doubts on the conformity of the law with privacy regulations. Some of the remarks of the Commission have been remedied during the legislative process. Others still pose questions. For instance, the retention term for the data will automatically be 8 years, even regardless proof of tax fraud.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

Belgium and the US signed an IGA on April, 23, 2014. Belgian financial institutions will thus be deemed compliant with Fatca and do not have to fear the US Source Tax 'penalty' of 30%. Initially, it was foreseen that the Belgian tax administration had to transfer the first series of bank data / financial information to the IRS ultimately on September, 30, 2015. At that time, internal legislation was not yet up to date and a delay was granted to exchange information.

The publication of the higher mentioned Law of December 16, 2015 gives the green light to Belgian banks to gather information, to transfer it to the Belgian tax authorities (generally within 6 months after the calender year) allowing them to report to the US under the FATCA Intergovernmental Agreement. The general deadline for the Belgian tax authorities entails them to report to the IRS within 9 months after the calender year.

Belgian financial institutions initially had to report the information required by the FATCA Intergovernmental Agreement in respect of 2014 (relating to the period between July, 1 and December, 31, 2014) to the Belgian Tax Authorities by 10 January 2016. However, on January, 18, 2016, the Belgian Federal Public Service of Finance (FPS Finance) subsequently announced that, following consultation with the financial sector, it will apply an administrative tolerance as regards the introduction of the FATCA files relating to income year 2014. This information has to be communicated to the FPS Finance at the latest on 15 April 2016. The deadline for the reporting in respect of income year 2015 remains unchanged (30 June 2016).

Important to notice is that there are some differences regarding the type of information that is to be exchanged between the US and Belgium. The IGA promotos reciprocity, but the collaboration of Belgium is more far reaching than the collaboartion of the US in the beginning.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

According to a FATF-report issued in April 2015, Belgium has the core elements of a sound anti-money laundering and counter-terrorist financing (AML/CFT) regime, although some elements are not yet fully in line with the 2012 FATF Recommendations.

The Mutual Evaluation Report of Belgium notes that Belgium has established a system for assessing the money laundering and terrorist financing risks. It uses an understanding of these risks as a basis for developing AML/CFT activities and has done so for a number of years. Understanding of risk and the implementation of AML/CFT measures and controls varies per sector however.

Some sectors, such as the financial sector, are much stronger in taking appropriate action to prevent money laundering and terrorist financing, while some money value transfer service providers do not have a full understanding or a complete implementation of AML/CFT measures. The non-financial sector has improved its commitment to AML/CFT.

However, certain relevant businesses and professions, such professions as lawyers and casinos, have not yet taken action according to the FATF. For lawyers, it should however be noted that they will in general adhere to the obligations under the anti-money laundering act. They regularly report to the disciplinary authority (the 'Batonnier') who subsequently decides whether further reporting to the CTIF-CFI is necessary.

Implementation of AML/CFT measures by diamond dealers does not appear to be adequate in relation to the high-risk identified for the sector.

Belgian authorities take appropriate action to prosecute money laundering cases. The financial intelligence unit (CTIF-CFI) collects and analyses quality data but needs to work more closely with some AML/CFT supervisors in addressing identified risks. Law enforcement authorities have the necessary investigative measures. Nevertheless, a lack of resources – especially within the criminal prosecution authorities - means that more complex and sophisticated money laundering cases are not always successfully investigated and prosecuted.

A recent press investigation and interview with a Brussels based investigating judge claims that 56% of the files reported by the CTIF-CFI are simple not investigated by the public prosecutor after denonciation. The judge also claims that a lack of ressources is causing for great financial damage to the Belgian state in (anti-)money laundering files.

The authorities responsible for preventing and combatting terrorist financing and terrorism have a good understanding of the risks the country currently faces. They play an active role in countering terrorist financing and demonstrated a high level of co-ordination, including with competent authorities in neighbouring countries. Weaknesses exist however in the application of targeted financial sanctions that are designed to prevent terrorist and terrorist organisations from financing their activities.

As far as tax matters are concerned, Belgium is quite up to date with evolutions in relation the 4th anti money laundering directive (directive 2015/849). 'Serious tax fraud' is already in scope of anti-money laundering legislation (law of January, 11, 1993), as well as from repressive criminal legislation (article 505 criminal law code). Proceeds of 'simple tax fraud' can be in scope of money laundering offences too (mainly for the taxpayer who committed the tax fraud: so called '2nd type money laundering offence' or '3th type money laundering offence').

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Yes. Some of the more important changes have already been enacted by Belgium in the past (e.g. introduction of a committie against money-laundering[13], tax offences,…).

It is not yet clear how the Belgian legislator will implement the UBO-register for anti-money laundering purposes. It is however expected that the Belgian register will not contain information on trusts, given that a trust is not a legal form of Belgian private law. Note however that the CTIF-CFI could obtain the information on trusts laid down in registers in other countries. Note also that beneficiaries of trusts might have to be identified as UBO under the anti-money laundering legislation (article 8 Law of January, 11, 1993).

1.2.5. If not, does your jurisdiction know similar shareholder registers?

[13] Royal Decree July, 23, 2013.

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Much information on taxpayers transactions is publicly released. Enterprises must register with the Crossroad Bank for Enterprises managed by the Federal Ministry of Economy. Companies deeds as well as those of Belgian private foundations must be published in the Official State Gazette and are available for the public online. Enterprises' financial statements generally are too. Small foundations do not have to lay down their accounts with the Belgian National Bank. These registers allow amongst othersfor a search on the basis of 'address'. It is however not possible to search on the basis of the name of a taxpayer and receive an overview of all companies/foundations to which he is connected.

Furthermore, a law of December, 14, 2005 abolished (in several phases) the possibility to issue bearer shares in Belgium. Sares are now either registered in the share holder register or 'dematerialized'; Belgian banks generally do not open bank accounts of which the holder's identity can remain hidden[14]; Major holdings in listed companies must be published[15] and transparancy measures were introduced for certain participations (or transfers in relation thereto) in non-listed companies too[16].

Finally, Belgian anti-money laundering legislation imposes financial institutions/lawyers/… to identify their clients (be it indivudals or companies, trusts or similar legal arrangements) and also the UBO's of the cliënts (thereby included the UBO's of trusts).

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

General

Yes, reporting obligations in the income tax return for individuals relate to 1) foreign bank accounts (as from 1997), 2) foreign life-insurance contracts (tax year 2013) and 3) 'legal arrangements' ('*juridische constructies*') (tax year 2014). Several legal commentators claimed that there might be a breach with EU-law and the fundamental freedoms that only foreign bank accounts & life insurance constracts have to be explicitly declared to the tax administration.

Asset protection structures

As of income year 2014, Belgian tax residents are obliged to declare in their annual tax return whether they (or their spouse or children) can be considered founders or (at that time) 'potential' beneficiaries of a "legal arrangement". The concepts 'legal arrangements', 'founders' and 'beneficiaries' are defined in a broad sense, aiming at bringing into scope of this reporting duty as much as possible taxpayers. It ressolves from an answer of the Minister of Finance that

14 CBFA 27 July 2004

15 Act of May, 2, 2007.

16 Article 515*bis* W. Venn.

some 2156 taxpayers confirmed to be ‘founder’ or ‘beneficiary’ of a foreign ‘legal arrangement’[17].

A legal construction is either a typical asset management structure such as (a) a trust, or (b) a non- or low-taxed foreign legal person of which the individual is a founder or beneficiary. Belgian taxpayers subject to legal entities income tax (such as not-for-profit organisations and the Belgian private foundation) are also subject to the reporting obligation as from tax year 2016.

As indicated higher, a new tax treatment (‘Cayman Tax’) has been introduced as from tax year 2016 in relation to these ‘legal arrangements’.

[17] Parlementaire vraag nr. 6108 van de heer Peter Vanvelthoven over "de vragenlijsten van de Gentse BBI inzake juridische constructies" en nr. 6128 van de heer Georges Gilkinet over "de onderzoeken door de gewestelijke directies van de BBI naar juridische constructies in het buitenland".

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

Reporting duty in corporate income tax

The most important obligation in this respect currently is a **reporting duty** in relation to payments to 'tax heavens'.

With effect from 1 January 2010, companies must report in their corporate tax returns all direct and indirect payments made to tax havens as soon as the total of such payments exceeds EUR 100,000 during a given accounting year (article 198(1)-(10) of the ITC). The countries deemed to be tax havens within the meaning of this reporting obligation are the following:

countries where the nominal tax rate is less than 10%.; and

countries not respecting the minimum OECD standard on transparency and information exchange (OECD standard). This caused problems for a while in relation to payments made to Luxembourg.

Due to the specific anti-avoidance rule, payments made to qualifying tax havens that are also not reported in the tax return are considered not deductible in computing profits.

In addition, reported payments are deductible only if the taxpayer is able to prove that the payment was made for an "actual and genuine" transaction with persons other than "wholly artificial arrangements". Further clarifications are provided by Circular AFZ 13/2010 (Ci.RH.421/607/890) of 30 November 2010, as amended. It is important to note that another amendment of 30 September 2015 confirms that the non-reporting of the payments, as such, may not lead to the non-deductibility of these expenses in the case where the EU rules on the free movement of capital and the non-discrimination provisions included in the tax treaties apply. On 21 January 2016, the Constitutional Court however rendered decision No. 11/2016 on a preliminary ruling request by the lower court of Antwerp in relation to the question whether the automatic non-deductibility and reporting rules in respect of payments to tax havens violate the constitutional principle of equal treatment and non-discrimination. According to the Constitutional Court, the failure to report payments to persons established in tax havens in accordance with Article 307(1)(3) of the ITC 1992 is, in principle, a sufficient reason to reject the deduction for tax purposes. The reporting obligation in the corporate income tax return thus exists irrespective of whether it concerns a real or sham transaction. A fraudulent intent is not required.

The Constitutional Court clarified that the obligation for companies to report payments to persons established in blacklisted countries dovetails with the framework of the fight against tax fraud and is intended to improve the efficiency of tax audits in connection with those payments. The obligation will enable the tax authorities to concentrate on the examination of such payments rather than on identifying them.

Thin cap

Two rules on **thin capitalization** apply. First, a 1:1 debt/equity ratio applies to loans granted by individual directors, shareholders and non-resident corporate directors to their company (article 198(10) of the ITC). Interest relating to debt in excess of this ratio is recharacterized into a non-deductible dividend. Also, the interest rate must not exceed the market rate. This rule is basically important in individual income taxes (though it affects the company too by disallowing deduction of interest paid) and does not necessarely relate to foreign income (generally it is applied in a purely belgian context).

Secondly, with effect from 1 July 2012, a 5:1 debt/equity ratio applies to debt if the creditor (resident or non-resident) is exempt or taxed at a reduced rate in respect of the interest paid on the debt. Interest relating to the part of the debt in excess of this ratio is considered a non-deductible business expense (article 198(11) of the ITC). The 5:1 debt/equity ratio also applies to intra-group loans. It follows from the scope of the tainted beneficiaries of the interest (i.e. residents and non-residents that are not subject to tax or enjoy a preferential tax regime for interest income) that the provision also wants to avoid base erosion and profit shifting to low taxed lenders.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

It currently does not. Belgium is one of the sole countries in the EU that does not explicitly have this obligation in its income tax law. Belgium thus does not formally impose documentation requirements. As such, entities that do not prepare contemporaneous documentation are not exposed to penalties.

However, in two practice notes, the Belgian tax authorities urge taxpayers to prepare contemporaneous transfer pricing documentation to support the arm's length nature of intercompany transactions.

According to the practice note of 28 June 1999, tax inspectors are to refrain from in-depth transfer pricing scrutiny in cases where the taxpayer has made efforts to determine transfer prices in accordance with the arm's length standard. By contrast, where the taxpayer only discloses vague, useless or inadequately founded information, the case must be examined more closely. Consequently, the practice note must be seen as more than just an invitation to taxpayers to compile extensive, relevant documentation based on the transfer pricing methodology adopted. It implicitly urges taxpayers to prepare upfront transfer pricing documentation.

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A second practice note was issued on 14 November 2006. It contains an update on certain points in the previous transfer pricing practice note, particularly regarding guidance on transfer pricing audits and documentation requirements. The second practice note confirms the embedding in Belgian tax practice of the EU Code of Conduct on transfer pricing documentation and its "Masterfile concept". The Code of Conduct is added as an appendix to the practice note.

In terms of the content of the documentation, reference is thus made to the EU Code of Conduct on transfer pricing documentation.

Belgium also makes reference to the OECD's September 2014 deliverable on Action 13 of the BEPS Action Plan containing revised standards for transfer pricing documentation and a template for country-by-country reporting of income, earnings, taxes paid and certain measures of economic activity. In a response to a parliamentary question on 11 March 2015, the Belgian Minister of Finance referred to the OECD BEPS project and endorsed the recommendations in relation to transfer pricing documentation and country-by-country reporting. Following these recommendations, the Belgian government envisages introducing formal transfer pricing documentation requirements given that such measure would contribute to more transparency, efficient audits and increased legal certainty. A feasibility and benchmark study on the introduction of mandatory transfer pricing documentation rules is already in progress and included as part of the 2015 operational plan of the Belgian tax administration.

The Minister stressed that clear rules in relation to the burden of proof should be established as part of a potential implementation and also highlighted the complexity of determining arm's length prices in a global environment. In this respect, he emphasized that transfer pricing disputes are not black or white and should not by definition be regarded as tax fraud to which specific penalties or sanctions apply. The Minister confirmed that there should also be no automatic extension of the normal statutes of limitation for transfer pricing disputes.

The tax administration is thus fully aware of the potential issues in relating to transfer pricing. Of course, the income tax code also foresees in disposition to tackle (artificial) profit shifting (see higher also).

Taxpayers (companies) can apply for an advanced ruling decision on the *at arm's length* character of their transactions (inter company loans, pruchase prices).

Important to mention is that the tax administration embodies a separate body of tax inspectors who focus exclusively on transfer pricing issues (*'cel verrekenprijzen' or specialist transfer pricing team (STPT)*). This body has been expanded over the past years and will keep growing in the future too. They regularly initiate tax investigations on a national scale (e.g. addressing 300 enterprises at the same time with a unified questionnaire). In short, the mission statement of the STPT is:

- to act as the central point of contact for all tax authorities dealing with transfer pricing matters;

- to maintain contact with the private sector and governmental bodies in the area of transfer pricing;

- to formulate proposals and render advice with respect to transfer pricing;

- to take initiatives and collaborate in the area of learning and education in view of better sharing of transfer pricing knowledge within the tax authorities; and

- to take initiatives and collaborate with respect to publications that the tax authorities have to issue regarding transfer pricing.

Recently, The European Commission concluded that selective tax advantages granted by Belgium under its "excess profit" tax scheme are illegal under EU state aid rules. The scheme allegedly has benefitted at least 35 multinationals mainly from the EU, who must now return unpaid taxes to Belgium.

The Belgian "excess profit" tax scheme, applicable since 2005, allowed certain multinational group companies to pay substantially less tax in Belgium on the basis of tax rulings which more or less form part of transfer pricing policy. The scheme reduced the corporate tax base of the companies by between 50% and 90% to discount for so-called "excess profits" that allegedly result from the sole fact of being part of a multinational group (‘advantages that only were able to obtain following the concurrential benefit the Belgian company had by being part of a multinational group). The Commission's investigation, opened in February 2015, claims that the scheme derogated from normal practice under Belgian company tax rules and the so-called "arm's length principle". This is deemed to be illegal under EU state aid rules.

2.1.3. Does the national law currently include obligations to report tax schemes?

It currently does not.

Valuable information can be found in the annual report of the Belgian Ruling Commission though, which sometimes also mentiones tax planning / strategies for which it did not wanted to grant a ruling decision.

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

See higher for a more extensive comment and hereafter for a short overview:

- Directive 2011/16/EU (and the amending directives) - The directive of 2011 was transposed into the Belgian domestic law by Law 52-2905 of 17 August 2013 and applies retroactively since 1 January 2013.

- Savings Directive (see higher)
- Multilateral Treaty of 1988: Belgium has become a signatory to the multilateral OECD Convention on Mutual Administrative Assistance in Tax Matters, which entered into force in respect of Belgium on 1 December 2000. In respect of Belgium the amending protocol entered into force on 1 April 2015 and generally applies from 1 January 2016.
- Double Tax treaties
- VAT
- Misscellaneous: Belgium is a party to the EU Arbitration Convention (90/436 on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises), which provides that where the commercial or financial relations between two associated enterprises differ from those which would apply between independent enterprises, the profits of those enterprises should each be adjusted as appropriate to reflect the arm's length position. The Convention provides for disputes with fiscal authorities to be referred to an advisory commission, subject to waiver of rights of appeal under domestic law provisions. The Arbitration Convention was first applicable with respect to the 15 old Member States. With respect to the 10 new Member States that acceded to the European Union on 1 May 2004, a new Accession Convention was signed on 8 December 2004 (Official Journal of the European Union, C Series, number 160 of 30 June 2005, page 1). The Convention entered into force in relation to Bulgaria and Romania on 1 July 2008.

2.2.2. For EU countries, please describe the current implementation in your country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

See higher for the general framework.

For the automatic exchange of rulings in particular, the Belgian Minister of Finance quite quickly stated that ruling will already start with spontaneously exchanging rulings granted as from January, 1, 2015. Belgium thus did not await the European evoutions and now already commits to exchange of rulings[18].

Belgium will also commit to the exchange of rulings as proposed by the European Comission. It is to be expected that the current unilateral initiative to spontaneously exchange rulings will also be aligned on the provision of BEPS-action 5.

[18] Question to the Minister of Finance, 4312.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

See higher.

Belgium traditionally prefers bilateral agreements regarding EOI. As a consequence, Belgium is party to bilateral conventions with dozens of countries. When Belgium initiates an EOI, it invokes every instrument available so that the most efficient one can be applied. In income tax matters, Belgium combines references to bilateral DTCs and Directive 2011/16/EU, when it requests a European Union country, or adds in some cases the convention of 25 January 1988 to the applicable DTC, when it requests another signatory country of this convention.

Belgium exchanges information mainly with countries with which it has substantial economic ties. The most frequently used form of exchange in Belgium is the exchange on request. Automatic exchange is of course gaining in importance (firstly via the Savings directive).

Belgium has conducted a pilot project of simultaneous audits with the Netherlands (A simultaneous examination is an arrangement between countries to examine simultaneously each in its own territory, the tax affairs of a taxpayer or taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain). Following the success of this cooperation, a similar programme has been organized with France too. Simultaneous examinations in the meanwhile have taken place with other European countries specifically to combat fraud.

In exceptional circumstances, a country may permit authorized officials of another country to enter its territory to interview taxpayers or examine books and records or to be present at such interviews or examinations carried out by its tax authorities in its territory in accordance with its procedures. The country that allows foreign officials to attend a tax audit keeps control of that audit. Belgium did particicipate several times in these kinds of audits. It is more reluctant to participate in investigations where it has no stake in the control of the audit.

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

(…)