

Summary and conclusions

Although the Constitution provides that “no tax for the benefit of the State can be introduced other than by law”, no definition of the term “tax” can be found in the Constitution or in any other law.

Case law, on the other hand, has ruled that the following five elements are required for a tax: (a) there needs to be a levy; (b) which is imposed; (c) by the public authorities; (d) on the resources of people living in the country or having interests therein; and (e) used for public utility services.

Obviously, as there is no definition of the term “tax” there is also no definition of the term “income tax” or “tax on capital” although the Income Tax Code labels four different taxes as income taxes.

Belgium, on the other hand, does not have any generalized taxes on capital such as a wealth tax, but there are at least two taxes (the immovable withholding tax and the annual tax on CIVs) which have to be qualified as taxes on capital.

The term “covered taxes” follows the OECD model but there again is not really an adequate definition of the term “taxes” and one therefore has to refer back to domestic (case) law for a definition.

The list of taxes included in the treaties which includes all the above four income taxes is further not exhaustive and other taxes which can be qualified as income taxes or taxes on capital can therefore also be covered taxes, except under those treaties which do not contain a separate definition of the term “taxes” and only list specifically the taxes covered.

The list of covered taxes even includes one levy (withholding taxes) which under domestic law is not a tax in its own right. Moreover, treaties generally also contain a clause like article 2(4) of the model allowing identical or substantially similar taxes to those explicitly mentioned to be included.

Conversely, the following taxes are generally not seen as covered taxes: VAT, gift, succession and registration duties and social security, although for the latter, this seems more a political decision than strictly a legal contention. The administrative commentaries further provide that exceptional taxes are excluded from the taxes covered, but this contention should probably also be contested.

The term “tax” is further also important for the concept of residence as Belgian treaties generally copy the OECD model which provides that a “resident of a

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Contracting State” is a “person” which “according to the legislation of that State” is “liable to tax” by reason of his “domicile, residence, place of management or any other criterion of a similar nature”.

The treaties, however, do not explicitly state to what tax a person should be liable in order to qualify for a treaty, although that in most cases due to the fact that Belgium also generally copies article 4(1) of the model this will need to be an unlimited liability. This, however, in line with the model does not exclude that residents of countries with territorial regimes like Hong Kong can be residents under the Hong Kong treaty.

People who are only apparent residents, because they are not fully subject to tax, such as individuals resident in Switzerland and only subject to the generalized forfeitary regime, on the other hand, will not qualify as residents.

The term “tax” is further also important for the method of avoidance of double taxation as under the unilateral method for avoiding double taxation, income must have been “taxed abroad”. Income is deemed to have been taxed abroad if the income has borne its normal assessment applicable in the country of its origin.

In order to qualify for the exemption method under the treaty, on the other hand, it is necessary to look at the exact wording of the treaty as there are generally “three” different languages which have been used.

A “first” category requires that the income “may” be taxed according to the treaty before the income should be exempt. In these treaties, Belgium must grant the exemption even if the other country does not exercise its rights to tax.

Under a “second” category of treaty the income must have been “taxed” in the other country before the exemption is granted. However, this will generally mean that income will be exempt provided it has borne its “normal” income tax regime in the country of origin (even if this has resulted in the fact that the income was not effectively taxed).

A “final” category of treaty, on the other hand, requires that the income was “effectively taxed”. Under those treaties the income must not only have been taxable, but the other country must effectively have exercised its taxing powers.

It further is generally accepted that article 24 extends, in so far as can be deduced from the discrimination covered under the article, to “taxes” of “every kind or description” which means that under such circumstances “any” levy that satisfies the above-mentioned conditions to qualify as a “tax” can be covered by the non-discrimination article.

As a result, legal doctrine has held that any discrimination in relation to “registration duties” or “VAT” would be prohibited under article 24.

The extent of taxes covered under the exchange of information article under Belgian treaties will, on the other hand, depend on the date of conclusion of the treaty and is directly linked to the wording of the model treaty in force at that time.

Under treaties concluded “before” 2000 the exchange of information is still limited to the taxes covered under article 2 as the treaties at that time provided explicitly that the exchange of information related to “the taxes covered under the treaty” (and hence referring back to article 2).

On the other hand, since 2000 (and via several changes to the model) the Belgian model and the treaties since then now explicitly provide that the exchange is not limited by article 2 (and hence is no longer limited to the taxes covered under article 2).

1. The notion of tax

1.1. Domestic law meaning of tax

1.1.1. Tax

While the Constitution provides explicitly that “no tax for the benefit of the State can be introduced than by law”,¹ no definition of the term “tax” can be found in the Constitution or in any other law. We consequently have to turn to case law to find a definition of the term “tax”. The Supreme Court, on many occasions, has had to address this issue and while its definitions have changed slightly over time² it for example still held in 2003 that “a tax is a charge that is made on the basis of their authority by the State, the regions, the communities, the provinces or municipalities on the resources of the persons living on their territory, or interests, to be appropriated for public utility services”.³

As a result, in order for a levy to be a “tax”, the following elements need to be combined:⁴

- there needs to be a “charge” or a “levy”;
- which is (unilaterally) made (and hence is “imposed”);
- by the “public authorities” (state, regions, communities, provinces or municipalities);
- on the resources of people living on the territory or having interests there; and
- used for “public utility services”.

Based on this, a “tax” can be distinguished from “other obligations” or facts such as:

- the obligation to build a pavement in front of a house is not a tax as there is “no levy”;⁵
- a “voluntary” payment is not a tax, as it is “not imposed”;
- a levy imposed by a “body emanating but separate from the State” such as a “public institution” is generally not a tax as it is not imposed “by” the public authorities themselves, unless the institution is not independent and is in fact an emanation of the state as the levy can then be deemed to be imposed by the state;⁶
- finally, as in order for a levy to be a tax it needs to be meant to “finance public services”, a charge meant for a “specific” service and where the charge is in relation to the service requested by the taxpayer is not a tax, but a “retribution”.⁷

¹ Constitution, art. 170.

² See e.g. Cass. 30 November 1950, Pas. I, 191, Cass. 12 October 1954, Pas. 1955, II, 106, Cass. 24 April 1958, Pas. 1958, I, 942, Cass. 13 June 1961, Pas. I, 119.

³ Cass. 20 March 2003 (see www.juridat.be; 3 March no. 179, p. 132).

⁴ For an international comparison with these elements, see Gitte Heij, “The Definition of Tax”, *European Taxation*, 2001, p. 74.

⁵ Cass. 21 January 1889, Pas. 1889, I, 88.

⁶ See e.g. Constitutional Court case no. 21/97 of 17 April 1997 (<http://www.const-court.be/public/n/1997/1997-021n.pdf>).

⁷ For an analysis of the difference between taxes and retributions for specific services, see John Kirckpatrick and Pol Glineur, “La distinction entre l’impôt et la rétribution, régie par l’Art. 113 de

Although no longer used in the OECD model,⁸ it is also important to mention the difference between “direct” and “indirect” taxes as this difference can also help to distinguish income taxes and taxes on capital from other taxes which will not be covered by double taxation treaties (DTTs). The Supreme Court has in this respect ruled that a “direct tax” is a tax where the basis is not formed by separate and transient facts but is characterized by a sustainable situation.⁹ An indirect tax, on the other hand, is obviously the reverse and is characterized by isolated, momentary facts or operations.¹⁰

A special mention should further be made of “withholding taxes”. Indeed, the Belgian courts have on several occasions ruled that (Belgian) withholding taxes are “not” taxes but only methods to collect a tax which itself has to be filed as such.¹¹ Moreover, to sustain this point, it should be noted that if the final tax is not filed before the statutory deadline, all withholding taxes earlier collected at source even have to be refunded.¹²

1.1.2. Tax on income and tax on capital

Obviously, as there is no definition of the term “tax”, there is *a fortiori* also no definition to be found of what constitutes an “income” tax (or a “tax on capital”).

The Constitution does not make any reference to “income” (or capital) taxes, but only provides that “taxes” should be introduced by law. There is therefore no real limitation relating to the nature of the taxes concerned.

On the other hand, the Law of 10 April 1992 has introduced the modified “Income Tax Code” which regroups the various taxes which are labelled as “income taxes”. This codification, however, does not give a definition of the constitutive elements of an “income tax”, but (like the OECD model in article 2 – see below) only lists that the following taxes are levied as “income taxes”:¹³

- a tax on the total income of resident individuals, called the “personal income tax”;
 - a tax on the total income of resident companies, called “corporate income tax”;
 - a tax on the income of other bodies than companies, called the “income tax for moral entities”; and
 - a tax on the income of non-residents, called the “non-residents income tax”.
- The scope of each of those taxes is further detailed in the Income Tax Code, but there is no real definition of what constitutes an income tax. The Supreme Court

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la constitution”, *Mélanges offerts à Jacques Vélu* (Bruylant) 1992, p. 546; Bruno Peeters, “De begrippen Last en Retributie in de artikelen 110 en 113 van de Grondwet”, *Rechtskundig Weekblad* 1987–1988, p. 241.

⁸ See history para. 2 to OECD model commentaries to art. 2.

⁹ Supreme Court 2 May 1967, Pas. 1967, I, 1024.

¹⁰ Supreme Court 10 November 1994, JDF 1994, 354.

¹¹ See e.g. Supreme Court 19 June 1975, JDF 1975, 278.

¹² For a discussion, see Ludo Cornelis, “Delgt de betaling van voorheffingen en voorafbetalingen een belastingschuld?”, *Fiskofoon*, 1986, 50; Th. Afschrift, “Lorsque l’impôt global sur le revenu n’a pas été enrolé dans le délai légal”, JDF 1985, p. 65.

¹³ Belgium has no generalized taxes on capital or wealth taxes and hence also does not have any definition of taxes on capital or wealth taxes.

has added in old cases relating to a former income tax law that “income taxes tax the income of a taxpayer and not his wealth or capital”,¹⁴ but this is not so much adding a distinction but rather just stating the obvious. Moreover, as the Constitution does not really impose a limitation on the type of tax that can be imposed, this does not really add to the debate.

On the other hand, all of the above taxes are always included in the list of “income taxes” in Belgian DTTs resulting in the fact that “these” taxes at least are to be considered as income tax, both for domestic and for treaty law purposes.

The administrative commentaries to the DTTs as far as “taxes on capital” are concerned add that while Belgium does not have any wealth taxes, many of its treaties – even with countries which also do not have any taxes on capital – still contain the clause on taxes on capital in order to ensure that if such taxes were introduced they would be covered by the respective treaties.¹⁵ This statement (that Belgium does not have any taxes on capital), however, does not entirely correspond to reality. Indeed, while Belgium may not have any “generalized wealth tax” it can for instance be seen from two cases before the Brussels tribunal of first instance that there are some taxes, even though they are not labelled as such, that qualify as a tax on capital.¹⁶ Similarly, the so-called “immovable withholding tax”,¹⁷ which is included in the Income Tax Code, has been since 2004 *de facto* a tax on capital as it does not operate as a withholding tax which is creditable against the final income tax, but is rather a non-creditable recurring annual tax calculated as a function of the rental value of the immovable in question.¹⁸

1.1.3. When are taxes paid to allow avoidance of double taxation?

Under the unilateral method for avoiding double taxation, income must have been “taxed abroad”,¹⁹ but the “timing” of such payment is *de facto* not seen as a major issue.

Indeed, the Code does not provide “when” the tax in question should be paid or have been paid.

Moreover, the administrative commentaries relating to the exemption method for individuals²⁰ even add that for certain income (where it can be assumed that it will have been subject to tax such as foreign real estate or regular salaries with a foreign employer) it does not even have to be proved that the income has been

¹⁴ Cass. 3 November 1930, Pas. I, 350.

¹⁵ See ComOv art. 2/44.

¹⁶ See Tribunal Brussels 2 August 2011 and 23 November 2011 relating to the annual tax on collective investment vehicles which has been included in the Code of Succession Duties.

¹⁷ *Onroerende voorheffing/précompte immobilier*.

¹⁸ Withholding taxes are generally creditable against the final income tax (see e.g. art. 279 Income Tax Code). The immovable withholding tax, however, has been transferred from a “federal tax” (when it was creditable against the federal income tax – see old arts. 277–278 Income Tax Code) to a regionalized tax that is now largely a funding mechanism for the regions. As a result, arts. 277–278 Income Tax Code (allowing the crediting of the immovable withholding tax) have been abolished and since then the immovable income tax has no longer been creditable, resulting in the fact that it largely has become a tax on capital and no longer is a tax on income.

¹⁹ See e.g. arts. 156 (exemption mechanism) or 285 (credit mechanism) Income Tax Code.

²⁰ The unilateral exemption mechanism for companies was abolished in 2002 (old art. 217 Income Tax Code as abolished by art. 13 Law of 24 December 2002).

subject to tax²¹ while for other income such proof should only be requested if serious doubts exist that the income was subject to tax.²²

Similarly, under the credit mechanism,²³ an old administrative circular provides that the income “should have been” subject to tax or “will be subject to tax” before the credit can be granted.²⁴

1.1.4. Foreign taxes

A fortiori, as there are already no definitions of “domestic” taxes, there are also no strict definitions of what constitutes a “foreign tax”.

On the other hand, article 156 of the Income Tax Code (unilateral measures to avoid double taxation) provides that the tax relating to professional income that is “taxed” abroad is reduced by half. The administrative commentaries to this code section state that “income is deemed to have been taxed abroad if the income has suffered its normal assessment applicable in the country of its origin”.²⁵ The commentaries, moreover, add in this respect that it is irrelevant “what form” the foreign tax takes. Lump sum computations of income are for instance also allowed and the fact that certain items of income would be taxable in Belgium and are not taxable in the source country does not jeopardize the application of the unilateral relief and thus still means that the income has been subject to a “foreign tax”.²⁶

1.2. Taxes covered by tax treaties’ distributive articles

1.2.1. Taxes covered

The taxes covered are very largely defined²⁷ as all taxes on income or capital irrespective of whether these taxes are collected at source,²⁸ via assessment, surcharges or other methods and irrespective of the public authority (state or local authority) assessing them or of whether these taxes are assessed on total income, parts thereof or on capital gains.²⁹

Some specific treaties³⁰ do not contain a separate definition of the terms “income taxes” or “taxes on capital” and these treaties are therefore limited to the specific taxes listed under article 2(3) of the treaty. Strangely enough, although those treaties limit the scope of the treaty to specifically listed taxes, they generally also contain a clause similar to article 2(4) of the OECD model relating to the identical or substantially similar taxes (see also below).

²¹ Com. IB art. 155/21.

²² See Com. IB art. 155/22.

²³ See art. 285 Income Tax Code.

²⁴ See Circ. CIRH 421/470.197 of 2 February 1996 (BdB March 1996).

²⁵ Com. IB art. 155/20.

²⁶ See Com. IB art. 155/20.

²⁷ See administrative commentaries to the DTTs (ComOv) 2/11.

²⁸ And this despite that the Belgian withholding taxes are not considered as “taxes” under domestic law – see above.

²⁹ See art. 2(1) of the OECD model and ComOv art. 2/11 and 2/21.

³⁰ See e.g. treaties with Australia, Bulgaria, Ireland or Japan.

The definition contained in the treaties, however, does not fully adequately define the term “tax” and one therefore, further to a landmark Supreme Court case of 1990, has to revert back to domestic law further to the referral to article 3(2) of the model. Indeed, the Supreme Court in the *Freens* case³¹ ruled that if a term is not defined and if no specific meaning of a term can be derived from the context it has to be construed according to the domestic legislation of the state applying the treaty. The same case, moreover, added that in this context one has to opt for an “evolving” rather than a “static” interpretation, which in turn has the effect that newer taxes could also be covered by the treaty if they could fall under the generic definition of article 2(1).

However, referring to the specific enumeration of the “taxes” included in the treaty (which always includes the list of the income taxes included in the Income Tax Code discussed above) it also has to be pointed out that the Belgian withholding taxes which are not considered taxes under domestic law³² are considered “income taxes” under the various treaties concluded by Belgium as they are included in the list of taxes covered under article 2(3).

1.2.2. Taxes “not” covered

Obviously, as the definition of income taxes is considered to include “all” taxes on income, it becomes interesting to see which taxes are “not” included in the taxes covered under article 2.

The treaties, however, generally do not include a list of taxes which are explicitly excluded. On the other hand, some treaties – generally at the request of the other contracting party³³ – under their article 2(1) only cover taxes that are due “on behalf of a Contracting State” (thereby excluding all taxes due to subdivisions, or local authorities). This is for instance the case under the treaty with the USA, resulting in the fact that under those treaties “local income taxes” or “immovable withholding taxes” are excluded.³⁴

However, it is generally considered that the following types of tax are “not” covered as they are (generally) not considered as taxes on income or capital (for the application of DTTs):

- VAT;
- gift, succession and registration duties: although these taxes are normally not explicitly excluded from DTTs, it can be worthwhile recalling the difference between “direct taxes” (which can be covered by DTTs) while “indirect taxes” are normally not. This distinction between direct and indirect taxes becomes especially important when one looks at gift, succession and certain registration duties as these could be characterized as taxes on capital. However, gift and succession duties (and also some registration duties) are rather assessed on isolated facts and operations and are therefore rather indirect taxes which are generally not covered by the DTTs, while the taxes on capital covered by DTTs are rather “direct” taxes on capital;

³¹ Supreme Court 21 December 1990, TRV 1991, 83, with note of Stefaan Van Crombrugge.

³² See note 18.

³³ See ComOv art. 2/36.

³⁴ See “Memorie van Toelichting” to the US treaty; see *Stukken Senaat* 2006–2007, of 26 March 2007, 3-2344/1.

- social security: social security contributions, while not explicitly excluded from DTTs, are “generally seen” as not covered by them.³⁵ This contention, although also followed by the OECD commentaries “if” there is a direct link between the contributions and the benefits,³⁶ can, however, be challenged as for most if not all social security contributions/benefits there is no longer a direct link between the contributions and the benefits.

Without entering into all the details, and just to illustrate the above,³⁷ one can refer to the following examples which clearly show the lack of the so-called direct link between social security payments and the underlying contributions:

- it should first of all be noted that social security “contributions” of “employees” are levied on “total wages”, while social security “benefits” are “restricted” to a certain wage level. There is clearly no link between the contributions and the benefits for any contributions paid on wages “above” this ceiling as there are simply no longer any benefits that can be obtained from such contributions;
- the absence of such direct link is even more apparent for “employer social security contributions” as there clearly are no rights for the employer linked to any benefits as a result of these payments. Moreover, we can even also ask the question whether these contributions should also not be seen as “taxes on the total amount of salaries” (see article 2(1) OECD model) and this despite what the OECD model commentaries or the Belgian administrative commentaries to the DTTs state in this respect;³⁸
- conversely, social security contributions do not suffice to fund benefits and such benefits are also funded via an endowment out of the general taxes that are being collected. Does this then mean that “these” taxes are no longer taxes as there is a link to social security benefits?
- looking specifically to some of the “benefits” it appears for example that “periods of unemployment” can be equated under the “pension” system, as periods of actual work giving rights to receive a pension, while no social security contributions have been paid during unemployment;
- unemployed people can also benefit from child benefits or medicare, while they are no longer paying social security contributions;
- similarly, under the child benefits system, there are several “surplus allowances”, while those who benefit from these have not necessarily paid any additional contributions, and others pay contributions without receiving those surplus allowances;

³⁵ Luc De Broe, *Fiscaal Compendium, dubbelbelastingverdragen*, D.1.2/4 p. 12; Bernard Peeters, *Dubbelbelastingverdragen* (Kluwer 1991), art. 2, para. 2.2.

³⁶ See commentary OECD model art. 2 para. 2.

³⁷ See in this respect also Frans Vanistendael, “Sécurité sociale: cotisation ou impôt”, editorial à la *Revue Générale de Fiscalité*, November 1995; Marc Bourgeois, “Réflexions à propos de la qualification juridique des cotisations sociales en droit fiscal international et communautaire”, in *Liber Amicorum, Jacques Autenne*, Bruylant, 2010, p. 89.

³⁸ See ComOv 2/35; it is worth mentioning that the administrative commentaries strangely enough do not exclude social security contributions altogether, but only do so explicitly in the realm of the discussion on “taxes on the total amounts of wages or salaries paid by the enterprises”.

- under the unemployment system, “school leavers” can benefit from an “activation allowance” while they obviously have never paid any social security contributions as they have never worked before;
- people under a so-called “living wage”, “unemployed people”, or other “low earners” can be exempt from certain contributions while remaining fully entitled to medicare benefits.

On the other hand, if social security contributions are not taxes, they also should not fall under the exchange of information article (article 26 OECD model), but this seems not to be so clear cut.³⁹

Despite the above, the conclusion is apparently not so clear cut. Indeed, while the Constitutional Court has taken the position that social security contributions are “not” taxes,⁴⁰ the Supreme Administrative Court rather takes a more nuanced position, stating that social security contributions are not automatically excluded from the notion of taxes;⁴¹

- exceptional taxes: the administrative commentaries to the DTTs provide that DTTs are only applicable to “ordinary taxes” and not to “exceptional taxes”.⁴² It can, however, be questioned whether this contention is correct. Indeed, the Belgian treaties generally do not include any restriction in this respect and treaties normally even stipulate that “‘all’ taxes imposed on total income, on the total value of property, or on elements of income shall be regarded as taxes on income and on property”. The reference to “all” taxes in this phrase already shows that the list is not restricted to “ordinary” taxes, which are not even defined in Belgian law although legal doctrine has sometimes referred to the above-cited taxes as “ordinary taxes”.⁴³ The same publication also contains a list of “other” taxes which are then labelled as “exceptional taxes”,⁴⁴ which according to the administrative commentaries to the DTTs would then probably not be covered (although this is very debatable – at least in so far as the taxes in question could qualify as taxes on income or taxes on capital);
- surcharges, accessories, fines, interest and penalties: the OECD model, although not taking an explicit position, seems to indicate that surcharges, fines and penalties are to be covered under DTTs on the basis of the principle *accessorium sequitur principale*.⁴⁵

However, in Belgian law “accessory duties”, “fines”, interest and penalties are normally not considered as taxes. Such “accessories” will therefore, as they are not explicitly mentioned in the treaties concluded by Belgium, “not” be considered as covered taxes due to the referral to domestic law via article 3(2) of the model.

Surcharges on existing taxes, on the other hand, are generally seen as either additional taxes or just as rate increases and are hence rather seen as taxes.

³⁹ See section 3.2.

⁴⁰ See e.g. Cases 64/95 of 13 September 1995 or 21/97 of 17 April 1997.

⁴¹ Tiberghien, *Handboek voor Fiscaal Recht* (Kluwer) 2009–2010, p. 4 with references.

⁴² ComOv 2/37.

⁴³ See Tiberghien, *op. cit.*, p. 63.

⁴⁴ *Ibid.*

⁴⁵ See OECD model commentaries, art. 2 para. 4.

Under the DTTs “surcharges” on personal income are normally even explicitly included in the list of taxes covered;

- in 2013 a “new” tax (labelled the “fairness tax”)⁴⁶ was introduced consisting of a separate corporate income tax assessment of 5.15 per cent levied on the profit distributions of Belgian companies (or branches of foreign companies) in so far as the underlying profits had not been effectively taxed due to the application of loss carry-overs or the notional interest deduction.⁴⁷
- The question has in this respect been asked whether this fairness tax can be considered a “covered tax” for the application of DTTs. At first glance, it would appear that this should be the case as it is just part of the “corporate income tax” which is a covered tax as it is even explicitly mentioned in article 2(3) of the list of taxes covered under the treaty. However, despite this factor, legal doctrine has been questioning whether it should be considered a covered tax due to the fact that the fairness tax is not really a tax levied on disposable income or on capital.⁴⁸ The authors making this argument, moreover, refer to a Swedish case ruled before the Swedish Supreme Administrative Court, where the Court held that a temporary tax on profit distributions was not a covered tax as it had not been explicitly mentioned in the treaty and could not be treated as a “substantially similar tax”.⁴⁹

A further argument can be found in the already above-mentioned case on the Belgium–Luxembourg tax treaty where the court ruled that the “place” of a tax in the tax codes is not determinant of whether a tax is to be considered an income tax or a tax on capital. It therefore could be that, if confronted with a case, the Belgian courts would determine that the fairness tax was not a covered tax as it could be a tax “separate” from corporate income tax and this despite the fact that it is “placed” in the Corporate Income Tax Code.

1.2.3. Relationship of articles 2.1 and 2.3 model convention

While the administrative commentaries, on the one hand, provide that the list of taxes enumerated under article 2(3) contain the taxes in existence at the time of the signature of a treaty,⁵⁰ they also add that while this list is “in principle complete”, it is “not exhaustive” and that this can be taken from the fact that article 2(3) indicates that this list “amongst others” contains the following taxes....⁵¹

Obviously, the above does not hold true in those treaties where article 2(1) of the model is lacking and where there is no general definition of what is considered to be an income (or capital) tax for the purposes of the treaty.⁵²

Moreover, the cases cited under the Belgium–Luxembourg tax treaty also explicitly confirm the above. Indeed, the Court not only rejected the position of the

⁴⁶ See art. 219ter Income Tax Code.

⁴⁷ For a discussion of the tax, see Bob Michel and Pieter Van Den Berghe, “Fairly odd: Belgium’s New Fairness Tax”, *European Taxation*, 2014, p. 223.

⁴⁸ *Ibid.*, p. 233.

⁴⁹ *Ibid.*; for a discussion of the Swedish case, see J. Kesti, “Temporary Tax on Profit Distributions”, 37 *European Taxation* (1987), p. 30.

⁵⁰ ComOv 2/11.

⁵¹ *Ibid.*; see also De Broe, *op. cit.*, D.1.2/7, p. 15.

⁵² See note 30.

tax authorities that the annual tax on CIVs was not covered by the tax treaty (as not explicitly mentioned) but also ruled that the list of taxes contained in article 2(3) was only meant to inform treaty partners of the list in question and was not meant to “circumscribe” the taxes covered as this had already been done in article 2(1) (and that hence article 2(3) was “not” limitative).⁵³

1.2.4. Identical or similar (future) taxes

The administrative commentaries on DTTs further also provide that “future” identical or similar taxes are (if a clause to this effect is included in the tax treaty) also covered by the treaties.⁵⁴

The commentaries, however, fail to stipulate when a tax is “identical” or “similar”. Legal doctrine has indicated that a tax can only be identical if both “scope” and “tax base” are identical. A “similar” tax would only be available if “the main components” (scope, tax base and rate), albeit perhaps slightly modified, appeared again in the new tax.⁵⁵

Although this can probably be followed for the term “identical” tax, it can be questioned whether this is also the case for a tax which would be “similar” to a former tax.

Indeed, case law on several occasions has had to address this issue and without going into details of every case, the courts have generally been more open to recognizing a newer tax as being similar to an older one.⁵⁶

2. Relevance of the notion of tax in the elimination of international double taxation

2.1. Tax treaty resident concept

2.1.1. General principles

Belgian treaties generally copy the OECD model which provides that in order to qualify as a “resident of a Contracting State” there needs to be a “person” (as defined in article 3(1)(a) of the model and referring to either an individual or a legal person) which “according to the legislation of that State” is “liable to tax” by reason of his “domicile, residence, place of management or any other criterion of a similar nature”.

⁵³ See note 16; for a review of these cases, see Oepen, Lievens and Van den Bruel, “Belgium–Luxembourg Income and Capital Tax Treaty (1970) resolves Double Taxation on Net Assets of Luxembourg Investment Funds with Belgian investors”, *Bulletin for International Taxation*, August 2013, 421; De Broe and Van Bortel, “Internationaal Belastingrecht 2012”, TRV 2013, 233, 247; Trippas and Bammens, “Taks op collectieve beleggingsinstellingen schendt DBV”, *Fiscooloog Internationaal*, 2012, no. 342, p. 4.

⁵⁴ ComOv 2/41.

⁵⁵ See De Broe, *op. cit.*, D.1.2/8 p. 16.

⁵⁶ See e.g. Brussels 3 March 1963, BdB 1963, 2115 (a special tax on the restoration of the country after the war has been deemed to be “analogous” to former taxes); Supreme Court 20 February 1968.

The treaties hence refer back to the domestic legislation of the state of which the person may be a resident. The Belgian administrative commentaries to the DTTs make this reference even more explicit by stating that “a person is a resident for the application of a DTT if that person according to the internal legislation of that country is considered to be a resident”.⁵⁷

That statement is, however, not entirely in line with the text of the treaty as the reference to the domestic legislation is not a reference to being a resident according to that legislation but rather just a reference to the fact that the person in question should be liable to tax (based on a criterion such as residence) in that particular country.

2.1.2. *Liable to what tax?*

The treaties, moreover, do not further qualify to “which tax” the person has to be liable, nor do they qualify whether such liability has to be “unlimited” (e.g. on worldwide income or if a “limited” liability could suffice). It is generally felt that this liability should be “unlimited”,⁵⁸ but this cannot be inferred from the text of the treaty at all.

The only requirement is therefore that the country of residence (as one refers to the resident of “a” contracting state by referring to the legislation of “that State”) subjects that person to “a” tax on the basis of the domicile, residence or other criterion.

The “type” of “tax” is therefore also irrelevant according to the article and for lack of further definition and by the application of article 3(2) one *de facto* refers back to the various taxes covered under the treaty (see above). It has even been argued that as article 4 does not refer to “taxes on income (or capital)” but solely to being liable to “tax”, the mere liability to “a” tax could suffice to make a person a resident under the tax treaties (at least in so far as the liability arises due to the fact that the person is liable to the tax in question due to his domicile, residence or other similar criterion). This has for instance been argued to treat Luxembourg funds organized in a corporate form as residents under the Luxembourg treaties⁵⁹ and this despite the fact that these funds are explicitly exempt from Luxembourg (corporate) income tax.⁶⁰

Reference can in this respect also be made to the already above-mentioned case of the lower court of Brussels⁶¹ which ruled that Luxembourg Sicavs were residents of Luxembourg for the application of the Belgium–Luxembourg treaty as they were subject in that country (because of their residence) to the Luxembourg net wealth tax (while actually not being subject to any income tax at all).

Strictly speaking, it therefore could even be (at least on the basis of the above-mentioned first part of article 4(1) of the treaty) that a person for the application of

⁵⁷ See ComOv 4/101.

⁵⁸ See e.g. ComOv art. 4/102; De Broe, *op. cit.*, D.1.4/2, pp. 10–11.

⁵⁹ For a discussion hereof, see K. O’Donnel and S. Nonnenkamp, “Fonds d’investissements et accès aux conventions préventives de double imposition”, in *Livre Jubilaire IFA*, Luxembourg, Bruylant, 2008, 493.

⁶⁰ See art. 161(1)(11) *Loi Impôt sur le Revenu (Luxembourgeois)* and art. 105 of the Law of 30 March 1998 on (Luxembourg) Investment Funds.

⁶¹ See notes 16 and 53.

the treaty is considered as a resident of a state, while that state does not treat the person as a resident.

An example hereof could be foreign executives who benefit from the Belgian special regime for expatriates.⁶² Indeed, such executives, although residing in Belgium and hence being subject to tax on the basis of their residence, are treated as non-residents for the application of the Belgian Income Tax Code and hence they are liable to the “non-residents income tax”.⁶³

However, the above example should only hold true for those treaties which did not contain the text in the second part of article 4(1) of the model which excludes those persons who are liable to tax in that state in respect only of income from sources in that state or capital situated therein. This is the case with the foreign executives under the expatriate regime (the non-residents income tax only subjects to tax those items of income from sources within the country). This is also the reason why the administrative commentaries provide that such expatriates can normally not benefit from the Belgian DTTs.⁶⁴

2.1.3. Territorial regimes

The above provision (i.e. that persons are only liable to tax on the basis of income from sources within the country) also potentially poses a problem for the residency status of companies in countries which only tax onshore income (like Hong Kong or Singapore). However, in those countries, such persons are not “only” subject to tax on income from sources in the country, but such countries rather exempt off-shore income, while subjecting the entity itself (in the first place) to unlimited taxation. The OECD model commentaries, moreover, explicitly provide that this part of the definition should not be read in such a fashion that persons who are resident of a country applying a “territorial system” would be excluded from the treaty.⁶⁵ In order to avoid any doubt, in this respect, the treaty between Belgium and Hong Kong even explicitly provides that entities residing in Hong Kong are to be treated as resident for the application of the treaty.⁶⁶

2.1.4. Apparent residents

On the other hand, although article 4 refers back to the domestic legislation of the country of residence to determine the residency status of a person, the administrative commentaries to the Belgian DTTs also provide that a person will not be considered as a resident for the application of the tax treaty if that person is only “apparently” a resident of the country in question.⁶⁷ This can – according to the administrative commentaries – be the case because (a) the person is

⁶² Adm. Circular of 8 March 1983; for a discussion, see J.L. Davain, *Le Régime special d'imposition des cadres étrangers*, Kluwer; see also F. Pötgens, *Income From International Private Employment*, IBFD doctoral series, chapter IV, ss. 2 and 2.2.

⁶³ In the same sense, see Heyvaert, “Art 4”, in *Het nieuwe B-NL DBV* (Larcier) 2001, pp. 39, 46.

⁶⁴ See Com. IB 235/27.

⁶⁵ See OECD model commentaries, art. 4 8(3).

⁶⁶ See protocol para. 2 to the Belgium–Hong Kong treaty and “Memorie van Toelichting” to the treaty, *Stukken Senaat* 2003–2004, 18 April 2003, 3-6601, p. 5.

⁶⁷ See ComOv art. 4/131.

only “apparently” the beneficial owner of an item of income for which he claims to be a resident; or (b) in the case of individuals who would be resident of a particular state without being subject to tax on all items of income from the first state.⁶⁸

While the first item can be subscribed to, the second seems only to be possible if there is an explicit reference in a particular treaty excluding such persons as they otherwise would qualify as resident as they are liable to tax in the state in which they are resident because of a criterion such as residence. This is also the reason why the Belgian-Swiss treaty excludes from the application of the treaty those individuals who are only subject to the “generalized forfeitary tax regime” applicable in Switzerland.⁶⁹

2.1.5. *Dual residents*

As Belgian treaties do not require a certain level of taxation in order for a person to be considered as a resident (but only that the state treating the person as a resident makes that person liable to tax based on a criterion such as residence, domicile or a similar criterion), there is also generally no need to review the level of taxation to resolve a dual residency issue.

Dual residency issues are therefore to be resolved through the tie-breaker provisions. If no tie-breaker provision is available, both states could treat a person as resident. Moreover, if Belgium – for the application of the treaty – has to yield its residency based on the tie-breaker, it will do so only for the application of the treaty itself. Once Belgium had received taxing rights under the treaty, it would continue to treat the person as a resident for the application of Belgian income tax. An individual who was a resident under Belgian domestic law, but which due to the tie-breaker rule in a treaty would be treated as a resident of the other contracting state, would therefore still be taxed in Belgium – subject to the treaty rules – under “personal income tax” (income tax applicable to residents) and not under “non-residents income tax”.

On the other hand, some treaties, such as the treaty with the USA, contain a specific rule for dual residents whereby the contracting parties will endeavour to resolve the issue and which provides that, if this cannot be achieved, the company in question will not be treated as a resident of either country.⁷⁰

2.2. The methods for the elimination of international double taxation

2.2.1. *Exemption system*

Belgium generally uses the exemption method as the main method to avoid double taxation.

⁶⁸ *Ibid.*

⁶⁹ See art. 4(4)(2) of the Belgian-Swiss treaty and ComOv art. 4/131.

⁷⁰ See art. 4(5) of the Belgian-US treaty; for a discussion, see Ph. Hinnekens, “Art. 4”, in *The New US-B DTT*, Larcier, 2009, pp. 73, 83.

Under the unilateral method to avoid double taxation (since the Law of 24 December 2002 is now only applicable for individuals) foreign income needs to be “taxed” abroad.

The Supreme Court in its landmark *Sidro* case⁷¹ has decided that “taxed” means in this respect that the income needs to have been taxed under the “normal” income tax regime in the country of origin, whereby it is irrelevant what form the tax takes, or that some items of income would be taxable in Belgium and not in the country of origin.

In treaty situations the above case law may also come into play, but in order to qualify for the exemption attention also has to be paid to the wording of the treaty, where three main wordings (and hence conditions) can be distinguished:

- a “first” category requires that the income “may” be taxed according to the treaty in the other country before the income should be exempt. In these treaties, Belgium must grant the exemption even if the other country does not exercise its rights to tax and the income remains untaxed;⁷²
- under a “second” category of treaties the income must have been “taxed” in the other country before the exemption is granted. It is in this category of treaties that the above-mentioned doctrine of the case law of the Supreme Court will come into play and where the income will still be exempt provided that the income has been taxed under the “normal” income tax regime in the country of origin (even if this has resulted in the fact that the income was not effectively taxed).⁷³

It is important to note, however, that the difference between the above two categories is not always easy to determine and requires a case by case analysis based on the specific wording of the treaty in question. Reference can in this respect for instance be made to a case of the court of first instance of Mons under the treaty with Lithuania (which uses the term “taxed”) which refused to apply the *Sidro* doctrine to the income of a consultant who received the income via the European Bank for Reconstruction and Development and which was exempt in Lithuania due to a treaty with the EU. The Court, among other things, indicated that the term “taxed” in the treaty in question was to be construed autonomously (and hence not as under the domestic rules of the *Sidro* case) and held further that it appeared that the contracting states had had the intention to avoid double non-taxation and that hence the country of residence should only grant the exemption if the income had been “effectively taxed” in the country of source.⁷⁴

Conversely, the Court of Appeals of Brussels in one case upheld the *Sidro* doctrine,⁷⁵ while on another occasion it refused to apply it;⁷⁶

⁷¹ See ComIB art. 155/20 and Supreme Court (*Sidro* case) 15 September 1970, BdB 489, 1679; for a discussion, see Th. Afschrift, “Exemption vaut impôt”, JDF 1980, 65; L. De Broe and N. Bammens, “Interpretation of Subject to tax clauses, in Belgium’s Tax Treaties”, *Bulletin of International Taxation*, 2009, 68.

⁷² See Administrative Circular AFZ no. 4/2010 of 6 April 2010, para. 6.

⁷³ *Ibid.*, para. 8.

⁷⁴ Court Mons 11 September 2013; for a discussion of this case, see M. Van Keirsbilck, *Fiskoloog Internationaal*, 31 October 2013, no. 359, p. 1.

⁷⁵ Brussels 17 October 2002, rol no. 1997/FR/151.

⁷⁶ Brussels 17 January 2008; for a discussion of this case, see M. Van Keirsbilck, *Fiskoloog Internationaal*, 31 May 2008, no. 294, p. 1.

- a “final” category of treaties, on the other hand, requires that the income was “effectively taxed”. Under those treaties the income must not only have been taxable, but the other country must have effectively exercised its taxing powers and the income may not have benefited from a tax exemption. On the other hand, if the income has been included in the taxable basis but there is no effective taxation as a result of deduction of expenses made to acquire the income, as a result of compensation for prior losses, or due to the benefit of deductions for family charges or other tax incentives, the income will be deemed to have been effectively taxed.⁷⁷

It should further also be noted that some treaties even contain a specific definition of “effectively taxed” which should then obviously also be followed.⁷⁸

On the other hand, the Belgian model treaty now provides under article 22(2)(C) that Belgium will, for the determination of the additional taxes established by Belgian municipalities and agglomerations, take into account the earned income of an individual that is exempt from tax in Belgium under the treaty. These additional taxes are to be calculated on the tax which would be payable in Belgium if the earned income in question had been derived from Belgian sources. In other words, while the income may be exempt from tax, the municipalities will still be able to levy local surcharges to the tax as if the income was earned in Belgium. Older treaties do not contain such a clause and one therefore has to review carefully the text of the treaty.

2.2.2. Credit system

In contrast to the exemption system, under the credit system – which is generally applied to avoid double taxation on interest and royalties – the Belgian treaties generally provide that the credit is granted as provided for in Belgian law and in accordance with the conditions and rates of this legislation.⁷⁹ Reference therefore has to be made to article 285 Income Tax Code which, among other things, provides that the foreign tax credit is only granted if the income has been subject to a tax similar to the Belgian personal income tax, or corporate or non-residents tax.

It is the taxpayer that has to provide the proof hereof,⁸⁰ which can be given by any means other than the oath and in practice this generally means that he has to prove that the interest or royalties have been subject to a withholding tax.⁸¹ One author even adds that it suffices to prove that a withholding tax has been withheld and that one does not have to prove that the withholding tax has been effectively paid to the other state.⁸²

At the same time, while the treaties generally refer to the conditions of domestic legislation, the text of the treaty should also not be ignored. Indeed, where the

⁷⁷ See Administrative Circular AFZ no. 4/2010 of 6 April 2010, para. 18.

⁷⁸ *Ibid.*

⁷⁹ See art. 22(2)(g) of the Belgian model treaty.

⁸⁰ See court of first instance of Ghent 14 January 2004 and court of first instance of Antwerp 16 October 2009 respectively concerning the DTT with the USA and with Italy.

⁸¹ See Dag Wyntin, “Grensoverschrijdende Inkomsten uit Roerend Vermogen”, p. 29.

⁸² See B. Peeters, “Het FBB en de onderworpenheidseis van Art. 187 WIB”, *Fiscoloog Internationaal* afl. 67, 15 June 1989, 1–4.

administrative commentaries to the DTTs provide that this had as an effect that the credit was only given for that part of the income that qualified for it under domestic law,⁸³ the Brussels Court of Appeals ruled that where a treaty provides that Belgium will provide for a credit for royalties that may be taxable according to article 12 of the treaty, this credit should be extended to the full amount of the royalties characterized as such under the treaty (and thus is not limited to the amount of such royalties or interest under Belgian law).⁸⁴

2.2.3. Deduction system

In addition to the above exemption or credit mechanism, it should be noted that the Supreme Court in the *Dick* case in 1968 has ruled that only the income “net of foreign taxes” was subject to tax.⁸⁵

The administrative commentaries to the DTTs add to this that it can be inferred from this case that this is only the case where the taxation in the other country is in accordance with the respective treaty concluded by Belgium with that country.⁸⁶

Although the reporter cannot agree with its ruling, it should further be noted that the Brussels Court of Appeals further concluded that only the tax that was specifically levied on the foreign income was deductible and not a proportionate share of the total tax on all income. The case related to the possible deduction against French real estate income of the French real estate tax (*impôt foncier*) and the French business tax (*taxe professionnelle*) where the first was allowed as a deduction, while the second was refused.⁸⁷

2.3. Non-discrimination

Belgium generally includes article 24(6) OECD model in its tax treaties, resulting in the fact that the term “taxes” under article 24 is much broader than the term “taxes covered” under article 2 which only covers taxes on income and capital.

It therefore is generally accepted⁸⁸ that article 24 extends, in so far as one can tell under the discrimination covered under the article, to “taxes” of “every kind or description” which means that under such circumstances “any” levy that satisfies the above-mentioned conditions to qualify as a “tax” can be covered by the non-discrimination article.⁸⁹

As a result, legal doctrine has held that any discrimination in relation to “registration duties” or “VAT” would be prohibited under article 24.

The most cited example of discrimination in legal doctrine in this respect related to the “former” capital duty where, although there has been no Belgian

⁸³ ComOv 23/124.

⁸⁴ Brussels, 12 September 2008, FJF 2009, 752; the case related to lease payments which under Belgian domestic law were only partially considered to be interest or royalties, while the full amount was treated as royalties under the treaty.

⁸⁵ Supreme Court 28 May 1968, Pas. 1968, I, 1118.

⁸⁶ ComOv 23/101; see also Antwerp 22 November 1988, FJF 89/30.

⁸⁷ Brussels 22 October 1999, TFR 2000, 90 with note A. Bax.

⁸⁸ See e.g. De Broe, *op. cit.*, D 1.2/11 p. 19 point 7; Peeters, *Dubbelbelastingverdragen, op. cit.*, art. 2, para. 2.3 and art. 24, para. 7.

⁸⁹ See ComOv art. 2/22.

case law, legal doctrine followed the old Dutch Supreme Court case that the non-discrimination article can extend to capital duty (which is clearly not covered under article 2).⁹⁰

The above is obviously only applicable if there is a comparable article to article 24(6) in the treaty. Absent such comparable article, it is likely that courts would rather follow the “later” case law of the Dutch Supreme Court where the Court decided that the Dutch-Canadian discrimination article in the Dutch-Canadian treaty did not extend to capital duty, for lack of a comparable article 24(6) in the treaty.⁹¹ This is likely to be important for treaties from “before” 1977⁹² and obviously also for treaties where there is no non-discrimination article.⁹³

In the latter case, we would have to rely rather on either the European Treaty freedoms’ non-discrimination articles or on the non-discrimination article in the Constitution.

Less clear is the question whether “social security contributions” could be covered under article 24(6). As indicated above, the issue of whether social security contributions can be treated as a tax is controversial. As there is not really a direct link any longer between the contributions and the benefits received, the reporter is rather of the opinion that from a strictly legal position this should be the case.⁹⁴

On the other hand, from a “practical” point of view, questions have been posed about the usefulness of the extension of article 24 to “any” taxes as a tax still has to fall under one of the categories covered under the non-discrimination article, leading to the fact that in many instances it could even be more successful to attack a potential discrimination via EU law⁹⁵ as was actually also done for the Dutch capital duty.⁹⁶

3. Relevance of the notion of tax in the elimination of double non-taxation situations

3.1. Tax treaty subject to tax clauses

As discussed above, many (albeit nowadays the older) treaties require Belgium already to exempt income if the income only “may” be taxed abroad.

It should be clear that under such wording there is no effective subject-to-tax clause included in the treaty in question and it even is totally irrelevant whether the

⁹⁰ See Dutch Supreme Court 27 April 1994, BNB 1994, 207–209–210; for a discussion, see Valkenburg, “Holding structures and exemption from capital tax law”, *European Taxation*, 1995, 170.

⁹¹ For a discussion of this case, see Rene Offermans, “Non discrimination clause in the Canada-Netherlands treaty not applicable to capital duty”, *European Taxation* (2001), 106.

⁹² Art. 24(6) (at that time art. 24(7)) appeared for the first time in the model with the OECD model convention of 1997.

⁹³ See e.g. the Belgian treaty with Australia.

⁹⁴ For an analysis hereof, see Bourgeois, *op. cit.*, pp. 89, 107.

⁹⁵ See e.g. J. Roels, “Art. 26” in *Het Nieuw Belgisch-Nederlands Dubbelbelastingverdrag* (ed. B. Peeters), Larcier, 2001, p. 575.

⁹⁶ See European Court of Justice C1/93 of 12 April 1994 (*Halliburton*), TRV 1995, p. 400.

other country taxes the income for which it has received taxing power under the treaty.

Under the Belgian model treaty, article 23 now provides that Belgium needs to exempt income (other than passive income) if the income “is taxed”.⁹⁷ However, this term, absent further clarification in the treaty, has to be construed according to domestic law via the application of article 3(2) of the treaty, meaning that – according to the above-mentioned *Sidro* doctrine – the income must have been taxed under the normal regime in the country of origin, even if no effective tax was levied.

In those cases there is a more pronounced need for effective taxation, but the clause does not (yet) equate to a real subject-to-tax clause requiring effective taxation.

Indeed, only if the treaty requires that the income be “effectively taxed” is there a more effective subject-to-tax clause.

The above clearly shows that avoiding double non-taxation is in practice not a stated policy of Belgian treaty policy even though this may be presented as the case.

Indeed, considering the above treaty language and the fact that Belgium is a monistic country⁹⁸ where treaties prevail over domestic law⁹⁹ one can, absent explicit language in the treaty, not assume that avoiding double non-taxation would be a treaty policy.

This is all the more confirmed, as pointed out by Luc De Broe in his doctoral thesis,¹⁰⁰ by the fact that the Belgian Minister of Finance even organized a road trip to Asia when the new Hong Kong treaty entered into force to convince investors to invest via a Hong Kong company in Belgium (the Belgium–Hong Kong treaty providing for a zero withholding tax on dividends and hence allowing the treaty to be shopped by a resident of another country).

3.2. Domestic law anti-avoidance provisions

In the reverse situation (where the Belgian tax base could be eroded via deductible payments paid to a low taxed vehicle abroad), the situation seems totally different. Indeed, like many countries, Belgium has a whole raft of anti-abuse provisions aimed at countering that its local tax base be so eroded.

Although a full analysis of all these provisions would be a step too far,¹⁰¹ it is interesting to note that several of these provisions require that recipients of the income are subject to either “no tax on income or are subjected to a fiscal regime which is notably more advantageous than that to which an enterprise established in Belgium is subject”.¹⁰²

⁹⁷ See art. 22(2)(a) of the Belgian model treaty; for a discussion L. De Broe, “Belgium’s Tax Treaty policy and the draft Belgian Model Convention”, *Bulletin for International Taxation*, 2008, 322, 333; J. Gombeer, “Orientations actuelles de la politique de la Belgique en matière de Conventions préventives de double imposition”, *Bulletin Documents SPF Finances*, 2008, 137, 147.

⁹⁸ Sachin Savcheda, “Tax Treaty Overrides, a comparative analysis of the monist and dualist approach”, *Intertax* 2013, p. 180 (and also p. 313).

⁹⁹ See Supreme Court 27 May 1971, Pas. 1971, I, 886.

¹⁰⁰ See Luc De Broe, *International Tax Planning and Prevention of Abuse*, IBD online books, para. 3.3.3.5.

¹⁰¹ For a more detailed analysis, see *ibid.*

¹⁰² See e.g. arts. 26, 54, 198(11) Income Tax Code.

The “reference” triggering the application of these anti-abuse rules is hence that either there is no tax due in the recipient country, or that the tax regime to which the recipient is subject is “substantially more advantageous” than the Belgian regime. The measure, in other words, does not qualify the type of tax to which the income or the recipient must be subject, but is triggered if in the end the regime (whatever it is) is “more advantageous” than the Belgian tax regime would be if the recipient were Belgian.

It may, however, be questioned whether these provisions can be applied where a tax treaty is concluded between Belgium and the country of the recipient which includes an article equal to article 24(4) of the model convention which provides that “interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State”.¹⁰³

3.3. Administrative assistance

The extent of taxes covered under the exchange of information article in Belgian treaties will depend on the date of conclusion of the treaty and is directly linked to the wording of the model treaty in force at that time.

Indeed, under treaties concluded “before” 2000 there was not yet any mention of the fact that the exchange of information is not limited by article 2 of the model. As a result, the exchange of information under these older treaties is still limited to the taxes covered under article 2 as the treaties at that time provided explicitly that the exchange of information related to “the taxes covered under the treaty” (and hence referred back to article 2).¹⁰⁴

On the other hand, since 2000 (and via several changes to the model) the model now explicitly provides that the exchange is not limited by article 2 (and hence is no longer limited by the taxes covered under article 2).

In the above analysis, moreover, it does not suffice only to look at the date of the conclusion of the treaty as the specific wordings may be important. Moreover, for some of the older treaties which predate 2000 (see e.g. the treaties with France or the UK) a protocol was signed at a later date which replaces or supplements the original article 26 in the treaty and now includes the language that the exchange of information is not limited by article 2.

It is here that the issue of whether social security should be considered a tax also comes again to the surface. Indeed, while it is generally considered that social security should not be considered a tax¹⁰⁵ (and hence should then also not be considered a tax for the application of article 26) at least one high tax official in his course on DTTs considered that social security should be one of the “taxes” for which the exchange of information article should be applicable.¹⁰⁶ This then,

¹⁰³ For a similar view, see De Broe, *International Tax Planning*, *op. cit.*, s. 6.2.4.1.2, para. 335.

¹⁰⁴ See e.g. art. 26(1) of the 1977 model convention.

¹⁰⁵ See section 1.2.2 on social security.

¹⁰⁶ Trinszky, *Cours de droit conventionnel*, ESSF, p. 300.

obviously again, supports the position that social security should indeed be considered a tax to begin with.¹⁰⁷

Obviously, irrespective of the date of the treaty or the protocol, attention also has to be paid to the specific wording of each treaty as there are also treaties which do not follow the above pattern. As an example hereof one can for instance refer to the Belgian-Swiss treaty which provides in article 27(1)(1) that the information that can be exchanged is limited to information needed for the exact application of the treaty. Some of the treaties with some of the former Republics of the USSR such as Kyrgyzstan, Moldova, Tajikistan or Turkmenistan (see articles 22 of the respective treaties) do not even contain an exchange of information article according to the OECD model, but solely provide that the contracting states in so far as necessary exchange information as to the changes in their legislation. These clauses are consequently even limited to exchanging information relating to new legislation as also described in article 2(4) and seem even less binding than article 2(4) as the clause even provides that the exchange should happen “in so far as necessary”.

However, the above “generally” means that under treaties concluded since 2000 any “levy” that could qualify as a “tax” could be covered under the exchange of information article, although the article also still has its own limitations such as for instance the fact that the exchange of information may not be contrary to the treaty. However, taking these restrictions or limitations into account, the exchange of information may under newer treaties now also be done for taxes which are clearly not covered by the treaty. Any other levy, including for example indirect taxes, VAT or customs duties, could be covered by the exchange (although for some of these other levies – including for example customs duties – there may be other more adequate conventions to gather and exchange information).

It finally should also be mentioned that the Belgian model treaty of 2010 now explicitly includes the wording that the exchange of information is not limited by article 2. In other words, it can be assumed, unless a treaty partner would want differently, that any future treaties concluded by Belgium will also likewise not be limited and that article 26 in those new treaties will cover any levy that qualifies as a “tax” under domestic legislation discussed in the beginning.

¹⁰⁷ See section 1.2.2 on social security.

