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Withholding Tax in the Era of BEPS, CIVs and the Digital Economy

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Agenda

Introduction
Some Belgian particularities
Belgian WHT & CIVs
Digital economy

Introduction

IFA Directives for Branch Reports

- Focus on the present and future of WHT as a means to provide for source taxation in the absence of a PE
- Existing international tax regime based on **two prominent pivots**, being the PE concept for active business profits and WHT for passive investment income
- A WHT system raises many challenges :
 - ✓ It subjects a private person (the WHT agent) to a legal obligation of properly administering tax law and collecting taxes from another private person - High burden, without any compensation
 - ✓ The WHT agent does not have the political power nor the legal knowledge to find out the net income of the payee – in practice, the WHT is generally levied on a gross basis – which lead to an inadequate treatment for the payee
 - ✓ Difficulties also for the WHT agent to characterize the nature of the payment (e.g. corporate actions for banks)

Introduction

IFA Directives for Branch Reports - WHT or PE ?

- Massive use of **CIVs** around the world → difficulties to apply a correct (i.e. fair) treatment – mostly lead to double taxation – cf. OECD Report dated 2012
- **Digital economy** – fear of revenue loss because many forms of information / products are now digitalized and transmitted over the internet → possible solutions are lowering of the PE concept or modifying the definition of royalties (cf. BEPS report and EU Commission recommendation) but is it the right course of action ?
- Can the same effect not be achieved by way of a **WHT** ?
- Would it not be simpler, handier and more convenient to re-define and expand the scope of passive investment income subject to a source WHT rather than (tempting to) lowering the PE concept ?
- Certainly given the ever-increasing tendencies for sophisticated taxpayers to avoid gaining a PE status

Introduction

IFA Directives for Branch Reports - WHT or PE ?

- But, even in international taxation, the idea of using WHT for re-defining the scope of source jurisdictions may be an **anachronism**:
 - ✓ Increased information exchange and collaboration between tax administrations (CRS, etc.) can be used to determine the net income of the beneficiary
 - ✓ EU case law – many case law on discriminatory treatment of non-resident shareholders v. resident shareholders – many regimes regarded as incompatible with EU (free movement of capital mainly) → leading to ever-diminishing WHT for non-resident taxpayers
 - ✓ Diminished use of WHT complemented by Mutual Assistance Directive and Recovery Assistance Directive

Belgian specificities

Is the fairness Tax a WHT ?

- Question to the CJEU: is the fairness tax a WHT at source in the meaning of art. 5 PSD ?
- CJEU: the fairness tax is not a WHT in the meaning of the PSD (CJUE, 17 May 2017, *X v Ministerraad*, C-68/15):
“in order for a tax to be classified as a WHT within the meaning of Article 5 of the PSD, three cumulative criteria must be satisfied. Thus, first, the tax must be levied in the State in which the dividends are distributed and its chargeable event must be the payment of dividends or of any other income from shares; second, the taxable amount is the income from those shares; and third, the taxable person is the holder of the shares”.
- Given that the taxable person for the purposes of the “fairness tax” is not the holder of the shares but the distributing company, the third condition is not met according to the CJEU.
- Abuse by the legislator in a PSD context ?

Belgian specificities

PSD GAAR & WHT exemptions

- On 27 January 2015, the EU Council adopted Directive 2015/121 to amend the PSD to include a general anti-abuse rule (“the PSD GAAR”) into the existing directive. The amendment is aimed at preventing taxpayers from gaining the benefits of the PSD through the use of artificial arrangements which do not reflect economic reality.
- The PSD GAAR reads as follows:
*“Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the **main purpose** or one of the main purposes of **obtaining a tax advantage** that **defeats the object or purpose of this Directive**, are **not genuine** having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as **not genuine** to the extent that they are **not put into place for valid commercial reasons which reflect economic reality**”.*

Belgian specificities

PSD GAAR & WHT exemptions (art. 266 BITC)

« La renonciation à la perception du précompte mobilier visée à l’alinéa 1^{er} ne peut pas produire ses effets en ce qui concerne les **dividendes** qui sont liés à un acte juridique ou à un ensemble d’actes juridiques dont l’administration, compte tenu de l’ensemble des faits et circonstances pertinents, a démontré, sauf preuve contraire, que **cet acte ou cet ensemble d’actes n’est pas authentique** et est mis en place **pour obtenir, à titre d’objectif principal ou au titre d’un des objectifs principaux**, la déduction des revenus visés à l’article 202, § 1^{er}, 1^o et 2^o, la **renonciation** visée à l’alinéa 1^{er} de ces revenus **ou un des avantages de la directive 2011/96/EU dans un autre Etat membre de l’Union européenne**. Un acte juridique ou un ensemble d’actes juridiques est considéré comme non authentique dans la mesure où cet acte ou cet ensemble d’actes n’est **pas mis en place pour des motifs commerciaux valables qui reflètent la réalité économique** ».

“De in het eerste lid bedoelde verzaking van de inning van de roerende voorheffing kan geen uitwerking hebben op **dividenden** die verbonden zijn met een rechtshandeling of een geheel van rechtshandelingen waarvan de administratie, rekening houdend met alle relevante feiten en omstandigheden, heeft aangetoond, tenzij bewijs van het tegendeel, dat **deze handeling of dit geheel van handelingen kunstmatig is** en is opgezet **met als hoofddoel of een van de hoofddoelen** de aftrek op de in artikel 202, § 1, 1^o en 2^o, bedoelde inkomsten, de in het eerste lid bedoelde **verzaking** op deze inkomsten **of één van de voordelen van Richtlijn 2011/96/EU in een andere lidstaat van de Europese Unie te verkrijgen**. Een rechtshandeling of een geheel van rechtshandelingen wordt als kunstmatig beschouwd **voor zover zij niet is opgezet op grond van geldige zakelijke redenen die de economische realiteit weerspiegelen**”.

Belgian specificities

PSD GAAR & WHT exemptions

- As a result, and based on the Belgian implementation of such rule, the Belgian WHT exemption will be denied whenever the dividends originate from legal acts or a whole of legal acts that are artificial (i.e. no valid business reasons that reflect economic reality) and merely in place to obtain the WHT exemption.
- Very broad implementation:
 - ✓ Applicable in domestic situations (article 106, §6 RD/BITC)
 - ✓ Applicable in third countries situation (article 106, §5 RD/BITC)
 - ✓ Seems to cover all potential dividend WHT exemptions (reference to article 266 BITC) and not only the PSD exemption on dividends (e.g. article 106, §§ 2, 7, 9)

Belgian specificities

PSD GAAR & WHT exemptions

- Very broad implementation (cont'd):
 - ✓ Also covers cases where the legal acts have been performed to benefit from a WHT exemption or the participation exemption regime in other EU countries
 - ✓ But not applicable for reduced WHT rates (e.g. the Tate & Lyle rate of 1,7%, even if article 344, §1 BITC could be applicable)
- >< Luxembourg where they have limited to a maximum extent the application of the PSD GAAR (ie not applicable in case of redemption proceeds / liquidation proceeds / domestic situations / situations with third countries / capital gains on shares)

Belgian specificities

Catch-all clause & PrWHT

- Act of 13 December 2012, amended by the Act of 18 December 2016.
- There were situations where a DTT was allocating the **taxing power** on some income **to Belgium**, but where the Belgian internal tax legislation **did not foresee an actual taxation**. The main purpose of the Belgian legislator was thus to fill in such gap.
- The “catch-all clause” derives its name from the fact that it foresees taxation in the cases **where the BITC did not already provide for specific tax rules**. According to the parliamentary works, **fees for technical services** paid to residents of at least the following **eight countries** with which Belgium concluded a DTT are taxable thanks to the catch-all clause, namely: Argentina, Brazil, Ghana, India, Morocco, Romania, Rwanda and Tunisia.
- Under pressure of the Council of State the initially foreseen scope of application was however **extended to situations without DTT**, to avoid discrimination between countries with which Belgium has concluded a DTT or not.

Belgian specificities

Catch-all clause & PrWHT

Cumulative conditions:

- ✓ An income stems from “any provision of services”, i.e. any operation that is not a supply of goods (it includes all services covered in the General Agreement on Trade in Services);
- ✓ The income qualifies as benefits or profit in the hands of the non-resident beneficiary;
- ✓ The services are provided to an individual tax resident in Belgium in the framework of his business activity, a corporation, a taxpayer subject to the legal entities tax or to a Belgian establishment ;
- ✓ There are (in)direct links of interdependence between the foreign supplier and its Belgian client;
- ✓ Such income is taxable in Belgium according to a DTT or, in the absence of any DTT, if the non-resident taxpayer does not provide evidence that such income is actually taxed in the State where it is resident.

Belgian specificities

Catch-all clause & PrWHT

- When these conditions are met, a **PrWHT of 33%** (potentially reduced by DTT application) is levied by the debtor of the income after deduction of **50% lump-sum costs** (an effective tax rate of 16,50% thus applies).
- It constitutes the **final tax** in the hands of the non-resident taxpayer unless it elects to file a non-resident tax return (**optional regularisation** regime). The non-resident taxpayer has indeed the possibility to file a non-resident income tax return in Belgium a bit “*as if*” it had a Belgian establishment to which the income aimed by the catch-all clause were allocated. This election is final and irrevocable for the given taxation year and is binding on the taxpayer.

Belgian specificities

Catch-all clause & PrWHT

- The possibility to file a non-resident tax return potentially allows the non-resident taxpayer to take into account the **professional expenses** linked to its taxable income in Belgium. However, it is as of today not clear at all **which expenses** can/could be taken into account in Belgium when applying the global assessment with this new provision.
- Interesting to note, in the BEPS era, is that this “catch-all” clause, although it was not its (declared) objective, may prove to be a very **effective weapon to fight against the use of companies based in tax havens**. Indeed, in the absence of taxation in these countries, the PrWHT was applicable.

Belgian specificities

Artists & Sportmen & PrWHT

- The situation of non resident artists and sportsmen, although not very relevant at first sight in the context of the BEPS discussions, is nevertheless interesting since they enjoy an **optional regularisation regime** (i.e. the possibility to file an income tax return), alongside the WHT system.
- The European commission handed at the end of February 2008 a **reasoned opinion** (infringement No 2006/2375) where it stated that:
*“Artists and sportsmen who are resident in Belgium are taxed at **progressive income tax rates** and can **deduct their professional expenses**. Artists and sportsmen who are resident outside Belgium are taxed at a **fixed rate** of 18 per cent and **cannot deduct** their professional expenses. This may lead to higher taxation of foreign artists and sportsmen. According the Commission such higher taxation is contrary to articles 49 and 50 of the EC Treaty, as confirmed by the European Court of Justice in Gerritse, Case C-234/01. It is also contrary to the corresponding articles of the EEA Agreement.”*

Belgian specificities

Artists & Sportmen & PrWHT

- At the time, non-resident artists and sportsmen were subject to **tax at the rate of 18%, via the levy of a PrWHT after deduction of lump-sum costs**. The PrWHT constituted the **final tax** in their hands. Resident artists and sportsmen were on the other hand taxed on their income according to a **progressive scale, after deduction** of either actual expenses or lump-sum expenses.
- The European Commission considered that non-resident artists and sportsmen should also have the **possibility to deduct their actual expenses**, and that a tax of **18% on the gross income** (from which are deducted lump-sum expenses) may in certain cases be higher than the tax applied according to a **progressive scale on the actual net income**.
- The Belgian legislator complied and decided to allow non-resident artists and sportsmen to **regularise** the income acquired in Belgium (i.e. to file a tax return where the PrWHT can be credited). The taxpayer's choice is definitive and irrevocable.

Belgian specificities

Artists & Sportmen & PrWHT

- Besides artists and sportmen, the optional regularisation system was also introduced with respect to personal indemnities collected by **non-resident individual researchers** from the exploitation of a discovery.

Belgian WHT and EU-Law – a long story ...

Investment companies or CIVs (the “Commission v. Belgium case”)

- Belgian “SICAV”/“Bevek” are only taxable, by way of derogation to the standard rules, on the total amount of the **abnormal and gratuitous benefits received and disallowed expenses**.
- In addition, those investment companies were until recently able to **credit** in their corporate tax returns the **MWHT** levied at source, and the potential **surplus** of the MWHT was **refundable**
→ In practice, Belgian SICAVs were **not suffering any income tax at all**.
- Since these rules **do not apply to foreign regulated investment companies**, those are not legally allowed to deduct nor recover the MWHT collected in Belgium on the dividends received
→ As a consequence, the financial returns of the foreign investment companies (suffering the MWHT on Belgian dividends) were thus lower than those of Belgian investment companies (where the MWHT was a mere pre-funding cost).

Belgian WHT and EU-Law – a long story ...

Investment companies or CIVs (the “Commission v. Belgium case”)

- The CJEU’s arrest of 25 October 2012 in the case “Commission v. Belgium” confirmed that such difference in treatment was **discriminatory** under the EU fundamental freedoms (free movement of capital and, as the case may be, the freedom of establishment).
- The **reaction** of the legislator was somewhat **surprising**. Where we could have expected the legislator to **extend the *de facto* exemption** on Belgian source dividends to comparable regulated foreign investment companies, the legislator chose the alternative way which consisted in **making sure the MWHT** levied on Belgian source dividends paid to Belgian regulated investment companies henceforth **constitutes the final tax** in their hands (without any credit or compensation whatsoever at the level of the shareholders of the SICAV).

Belgian WHT and EU-Law – a long story ...

Investment companies or CIVs (the “Commission v. Belgium case”)

- The **discrimination** under European law has thus been **abolished**, yet by **generalising the double, or even triple, economic taxation on Belgian dividends** (taxation of the *Belgian operational company* at the corporate tax rate of 33,99%, taxation of the *Belgian SICAV* on the Belgian dividends received at the MWHT rate of 30%, to which is added another taxation at a MWHT of 30% in case of *dividend distribution* by such SICAV!).
- In addition, it is striking to witness that this legislative modification is in **contradiction** with the general accepted principle according to which **investment companies**, given their nature, **should not generate any “tax leakage”** between the underlying investments and the ultimate investors. This is one out of the many inconsistencies of the Belgian tax treatment of collective investment undertakings in particular, and of the taxation of savings in general.

Belgian WHT and EU-Law – a long story ...

Holding companies (the “Tate & Lyle Case”)

- Belgium applies the mechanism foreseen by the **PSD** for the elimination of double taxation of dividends in **cross-border situations** as well as in **internal situations**.
- When the **investment value** of a participation **reaches** the threshold of **10%** (among other conditions), the dividend paid by the Belgian subsidiary company to the (Belgian/foreign) parent company is **exempted from MWHT**. In the hands of the Belgian parent company, **95% of the gross dividend so received is excluded from the corporate tax base** (leading to an **effective tax rate of maximum 1,7%**, knowing that the **professional expenses** of the company, if any, might further reduce its taxable basis). In the hands of the **foreign parent company**, the exemption of MWHT means **no non-resident tax at all**.

Belgian WHT and EU-Law – a long story ...

Holding companies (the “Tate & Lyle Case”)

- A **difference in treatment** was occurring when the parent company held a **participation of more than EUR 2.500.000 but less than 10%** in the Belgian subsidiary (case not addressed by the PSD). When the investment value of a participation was reaching the threshold of EUR 2.500.000 but not the threshold of 10% (among other conditions), the dividend paid by the Belgian subsidiary company to the (Belgian or foreign) parent company was subject to the **full MWHT rate** (possibly reduced based on DTT in case the beneficiary was a foreign company). In the hands of the **Belgian parent** company, **95%** of the gross dividend so received was **excluded** from the corporate tax base (leading to an effective tax rate of maximum 1,7 %, knowing that the professional expenses of the company, if any, might further reduce its taxable basis) and the **MWHT** initially levied was **creditable** against the corporate tax due, and any surplus **refundable**. In the hands of the **foreign parent** company, the MWHT (after reduction based on the applicable DTT) was constituting the **final tax**.

Belgian WHT and EU-Law – a long story ...

Holding companies (the “Tate & Lyle Case”)

- The CJEU’s order of 12 July 2012 in « *Tate & Lyle Investments Ltd* » confirmed the **discriminatory** character of this difference of treatment under the EU fundamental freedoms (free movement of capital and, as the case may be, freedom of establishment).
- This time, the Belgian legislator reacted by **extending to foreign companies its mechanism for the elimination of double taxation**. It was indeed decided to **reduce the MWHT rate** applicable to the foreign companies to 1,7% (i.e. 5% of the nominal corporate tax rate which is currently 33,99%). The deduction of costs set aside (authorised for resident companies, but still prohibited for the non-resident companies) the difference of treatment has thus been resolved.
- Note the **diametrically opposite reactions** in the case of investment companies (double economical taxation for everyone) and holding companies (mitigation of the double taxation for everyone). All taxpayers are not equal when the avoidance of double economic taxation is concerned...

Belgian WHT and EU-Law – a long story ...

“Investment-holding” companies (the Wereldhave case)

- The two aforementioned situations enable us to address a third situation – in a matter of speaking, a combination of the two previous ones – namely those of the **foreign investment companies holding participations of more than 10% in Belgian companies**.
- This situation typically comes along in cross-border **master-feeder structures** where a foreign investment company has an important shareholding in a Belgian investment company, or in case of real estate funds (**REITs**) where foreign REITs often hold Belgian SPVs, i.e. Belgian companies subject to common corporate tax system which purpose is to own a building.
- As mentioned above, European parent companies holding a participation of **more than 10%** in a Belgian subsidiary company in principle benefit from an **exemption of MWHT** on Belgian dividends. However, such an exemption is only applicable **if the foreign company** is, among other conditions, **subject to corporate tax** (or assimilated) in its country of establishment, without the possibility of an option or of being exempt.

Belgian WHT and EU-Law – a long story ...

“Investment-holding” companies (the Wereldhave case)

- The question was asked to the CJEU whether an investment company which is **subject to tax at a zero rate provided that all of its profits are paid to its shareholders**, should be considered as liable to pay income tax in the meaning of the PSD.
- According to the CJEU, this condition “*does not merely require that a company should fall within the scope of the tax in question, but also seeks to exclude situations involving the possibility that, despite being subject to that tax, the company is not actually liable to pay that tax*”. The CJEU further mentions that “*the inclusion in national legislation of a provision whereby a specific category of companies may, in certain circumstances, be entitled to be taxed at a zero rate is tantamount to not subjecting those companies to that tax*”.

Belgian WHT and EU-Law – a long story ...

“Investment-holding” companies (the Wereldhave case)

- It results from this interpretation of the CJEU that the **foreign investment companies** established in the EU (which, in general, do benefit from a tax regime deviating from the common tax regime in such a way that they do not usually suffer income tax) holding 10%-plus shareholding in Belgian companies will in principle **not be able to benefit from the MWHT** exemption on the Belgian dividends. They will thus suffer the MWHT of 30% (potentially reduced pursuant to the applicable DTT).
- However, this will **not be the case of Belgian investment companies**. As a matter of fact, in purely internal situations, the Belgian tax legislation does not foresee for an effective taxation condition, so that “*falling into the scope of*” corporate tax is sufficient.

Belgian WHT and EU-Law – a long story ...

Life insurance companies

- As a recall, « Tate & Lyle » led to a reaction of the Belgian legislator whereby, the rate of the **MWHT** applicable to **foreign companies** was reduced to **1,7%** (namely 5% of the nominal corporate tax rate which is currently 33,99%) what makes it, in theory, equivalent to the effective tax rate on dividends received by a **Belgian resident company** by application of the **Belgian participation exemption regime** (the Belgian resident company being able to deduct from its taxable basis 95% of the dividend received, the 5% remaining being taxed at the corporate tax rate of 33,99%).
- Is Belgian legislation henceforth immune to any disputes under EU law ?
 - ✓ The **Belgian company** will be able to **deduct professional expenses** of the residual taxable basis (i.e. on the remaining 5% taxable), regardless of their (direct or indirect) link to the participation having generated the dividends, or to the collection of the dividends as such.
 - ✓ For the **foreign company**, the **MWHT of 1,7% constitutes the final tax**.

Belgian WHT and EU-Law – a long story ...

Life insurance companies

- The European case law is gradually evolving (based on the free movement of capital, the freedom of establishment, also the freedom to provide services) and we cannot exclude the need for the Belgian legislator to foresee the **possibility** for the **foreign parent company** to be able to **deduct part of its professional expenses** from the MWHT taxable basis.
- In short, the question is not to know “**whether**” professional expenses should be deductible of the withholding tax base (the answer is “yes” based on current CJEU case law) but rather to know “**which**” professional expenses should be (e.g. for dividends: Expenses directly linked to the collection of the dividend? Expenses linked to the management of the participation having generated the dividend? Indirect / overhead costs?)
- According to AG Kokott in her opinion in the Brisal case, the **double deduction of expenses** (i.e. in the source state for the computation of the WHT and in the residence state for the computation of the income tax) **is fully justified if both states impose the same income**.

Belgian WHT and EU-Law – a long story ...

Life insurance companies

- **The case of unit-linked life insurance products.**
 - ✓ An insurance company **collects premiums**, these premiums are then invested into financial instruments including shares (which constitute the “**representative assets**”) in order to cover the **financial commitments** agreed on with the policyholders (which take the form of “**technical provisions**”).
 - ✓ In order to satisfy their commitments, Belgian and foreign insurance companies thus have the **obligation to book technical provisions**. In the specific case of unit-linked life insurance products, there is a **matching between representative assets and technical provisions** in the accounts of the Belgian insurer (in other words, for every income received on the representative assets, i.e. every profit, the Belgian insurance company books a technical provision, i.e. a cost).

Belgian WHT and EU-Law – a long story ...

Life insurance companies

- Reasoning:
 - ✓ The technical provisions booked by **insurance companies established in Belgium** are, in principle, considered as **deductible professional expenses** (subject to some specific rules to follow).
 - ✓ **Foreign insurance companies** (without a permanent establishment in Belgium to which the representative assets/technical provisions would be allocated to) are **not authorized to deduct** any professional expenses in Belgium, in particular their technical provisions, from the MWHT taxable basis formed by the Belgian dividends received.
 - ✓ This impossibility of deducting i.a. technical provisions from the taxable basis applies **despite the direct link** which exists between the increase of the technical provisions and the Belgian dividends received on shares held as representative assets.

Belgian WHT and EU-Law – a long story ...

Life insurance companies

- Impact:
 - ✓ The **Belgian insurance company** benefits from the **deductions** of the technical provisions, and thus from a **zero tax base on the dividends received** and can **recover** the MWHT initially levied on the dividends received
 - ✓ The **foreign insurance company cannot deduct** any expense on the MWHT base hence suffers the MWHT in full (possibly reduced based on the applicable DTT).
- Conclusion:
 - ✓ The discriminatory nature of this difference in treatment is quite obvious, in particular based on the CJEU case law in the case “Commission v. Finland” where the Court stipulates that *“it suffices to state that, in the national legislation at issue (...) the national legislation explicitly treats the amounts reserved/set aside with a view to meeting their obligations in respect of pension liabilities as ‘expenses ... incurred in order to acquire or maintain the income from economic activity’”* (that is to say, deductible expenses), so that *“it thereby **creates a direct link** between those amounts and the activity of the pension insurance bodies generating taxable income and itself **makes them indissociable**”*.

Belgian WHT and EU-Law – a long story ...

Standard corporates

- For standard EU companies holding Belgian shares not meeting the threshold for benefitting from the reduced MWHT of 1,7%, the question of the possibility to deduct part of their professional expenses in the Source State (here Belgium) from the MWHT taxable basis may also be relevant. This **“gross vs net”** question is indeed not only **relevant** for insurance companies but to some extent **for all EU based companies**.
- I therefore call for a **general rule allowing the deduction of appropriate expenses, even in the absence of a permanent establishment**. More precisely, we would suggest to provide an **option** to all EU companies suffering a Belgian MWHT to get these deductions in a so-called **“notional” permanent establishment** and to define broadly the deductible expenses (based on CJUE case law), given the fact that one may never forget that this double deduction of expenses is justified by a double taxation of the same income in two different countries). A source of inspiration in this respect could be the regime applicable for non resident individuals such as artists and sportsmen.

Belgian WHT and EU-Law – a long story ...

Belgian tax reform

- The tax reform is expected soon, with as main objective being to **reduce the corporate tax rate to 25%** as from 2020. Important to note is of course the expected impact this lowering of the corporate tax rate might have on **existing differences in treatment**. It could even **create new ones**, especially if the standard MWHT rate remains at 30%.
- Strangely enough, if the standard Belgian MWHT rate remained at 30%, then Belgian **regulated investment companies** would be **taxed more heavily** on their Belgian source dividends (30% MWHT constituting the final tax) than Belgian companies subject to the **common corporate tax regime** (25%).
- In addition, foreign investment companies will probably claim - even if debatable - that **the right comparable** to assess the discriminatory character of their Belgian tax position should be **Belgian companies subject to the common corporate tax regime** and try to obtain a refund of the difference (5%).

Belgian WHT and foreign CIVs

- Considering the **force increase of the MWHT rate** over the years, in particular the MWHT rate on dividends of listed companies (from 15% until 2011 to 30% as from 1 January 2017), foreign CIVs are increasingly **required to have recourse to DTTs** to obtain reduced MWHT rates
- The application of the DTTs **assumes that CIVs are treaty-entitled**. In that respect, the well-known issues spotted in the OECD study *“The granting of treaty benefits with respect to the income of collective investment vehicles”* (2010) apply.

Belgian WHT and foreign CIVs

- Belgium historically considers that a CIV is “**liable to tax**”, and is therefore a “**resident of a Contracting State**”, even if the State in which it is established does not in fact impose any tax on the CIV. The key element lies in the fact that the investment company is **subject to** income tax in the State where it is established, even if the specific items of income it receives are exempt from taxation. This position is defended by Belgium with respect to the DTT entitlement of Belgian investment companies, such as Belgian SICAV. On the other hand, a CIV that is transparent for tax purposes in the State in which it is established will not be treated as a resident of a Contracting State because it is not liable to tax in that State.
- Interesting to note that, according to the OECD (in the MLI context), since the investment decisions of CIVs are typically not dictated by their beneficiaries, these vehicles **do not raise the same treaty-shopping concerns as entities such as private companies**.

WHT & Digital economy

- EU Commission's Communication on Taxation of the Digital Economy
- No per se withholding tax on digital transactions (gross-basis final withholding tax on payments made to non-resident online providers of goods and services)
- Belgian beneficial tax regime for the collaborative economy
 - 10 % WHT tax on transactions in the collaborative economy
 - Conditions:
 1. Individual's profits are < 5.100 euro annual
 2. Profits earned outside professional activity
 3. Transaction occurs by registered platform
 4. Service offered to individual acting non-professionally
- Crowdfunding (WHT exemption on interest for loans granted to start-ups SMEs through a recognised crowdfunding platform)

EC's Comm. on Taxation of the Digital Economy Introduction

- The Digital Single Market is one of the main priorities of EC
- Current tax rules no longer fit the modern context
 - Opportunities for tax avoidance
 - Loss of tax revenue
 - Destabilisation of level playing field and
- European Commission's underlying principle: *"Businesses must pay taxes where their profits and value are generated"*
- Ongoing EU actions:
 - Tackle aggressive tax planning
 - Increase tax transparency
 - Tackle State aid control
 - VAT proposal on e-commerce
 - Common Consolidated Corporate Tax Base (CCCTB) negotiations

EC's Comm. on Taxation of the Digital Economy Businesses are now more digitalised than ever before

- No physical presence required anymore to sell goods and services
 - Difficulties to establish tax base
 - Disrupting existing business models (online platform reacts more effectively to demand)
 - Fragmentation of trade
 - Transformation of products to their digital representation (ex. E-books, 3D printing)

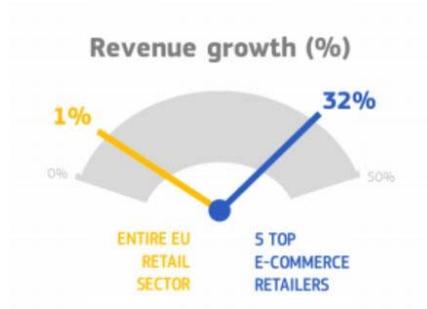


EC's Comm. on Taxation of the Digital Economy

Businesses are now more digitalised than ever before

Digitalisation as a facilitator of cross-border trade

- Rapid growth of e-commerce vs. slow growth of retail sector



EC's Comm. on Taxation of the Digital Economy

Critical Challenges

Two main policy challenges

- Where to tax \Rightarrow How to allocate taxing rights when services are provided without physical presence in the EU
- What to tax \Rightarrow How to attribute profit to business models driven by intangible assets, data and knowledge
- Example: Spotify
 - EU customers pay subscription fees to Spotify in return for music access
 - No taxable presence in EU since revenue generated by Spotify is located outside of the EU

EC's Comm. on Taxation of the Digital Economy

The way ahead (long-term measures)

Embed taxation of digital economy in existing framework

- Reform permanent establishment (PE) rules
 - Physical presence vs. Significant economic presence (alternative indicator)
- Rethink transfer pricing rules
 - Allocation of profits based on analysis of the functions, assets and risks
 - v.
 - Valuing intangible assets requires alternative profit attribution methods
- Establish anti-abuse rules
 - Introduction of a subject-to-tax clause / General Anti-Avoidance Rules (GAAR)
- EU Common Consolidated Tax Base
 - CCTB provides EU framework to implement above measures
 - Formula apportionment approach based on assets, labour and sales

EC's Comm. on Taxation of the Digital Economy

The way ahead (short-term measures)

Alternative options for short-term solutions

- Option 1: Equalisation tax on turnover of digital companies
 - Tax all untaxed/insufficiently taxed income generated from digital economy activities
 - Open questions (Scope and basis of equalisation tax ; Definition of digital companies/digital activities ; Definition of turnover in relation with different business models ; Collection of taxes ; Compatibility with DTT, state aid rules, fundamental freedoms and international commitment under the free trade agreements and WTO rules)
- Option 2: **Withholding tax on digital transactions**
 - **Gross-basis final withholding tax on payments made to non-resident online providers of goods and services (Online retailer model, subscription model, collaborative platform model)**

EC's Comm. on Taxation of the Digital Economy The way ahead (short-term measures)

Alternative options for short-term solutions

- Option 3: Levy on revenues generated from the provision of digital services or advertising activity
 - Separate levy to transactions where non-resident entity has a significant economic/digital presence
 - = Transformation of the existing PE-concept based on physical presence to a more economic understanding
 - Alternative factors: level of revenue, number of users, the volume of data collected
 - Applicable for the social media model (Facebook etc.)

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