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BENEFICIAL OWNERSHIP

Facts

H Co is a Host Country corporation all of the stock in which is owned by F Holdco, a Country X corporation that serves as a holding company for a group of operating companies within the multinational group of which H Co and F Holdco are members. All of the stock in F Holdco is in turn owned by Parent, a Country Y corporation that is the ultimate parent company of the group. H Co manufactures and distributes widgets under sublicenses from FIPCo, a Country Q subsidiary of Parent that licenses the relevant intellectual property from Parent, which owns such property. FIPCo oversees the registration of the intellectual property it licenses from Parent and manages efforts by outside lawyers and other third party contractors to ensure that such property retains its legally protected status and that such status is enforced against potential infringers, but employs only three people to do so. Host Country does not have any domestic legislation or income tax treaty with Country Y that provides relief from any Host Country withholding tax on dividends, interest or royalties paid to residents of Country Y.

H Co regularly pays dividends to F Holdco. F Holdco generally redistributes to Parent all of such dividends (less an amount to cover its modest administrative costs) within 90 days of receiving them. Under its domestic legislation or income tax treaty with Country X, H Co imposes a substantially reduced withholding tax on dividends paid by Host Country corporations to corporate residents of Country X that own a substantial interest in the dividend-paying corporation, but only if such residents are the beneficial owners of the dividends in question. Country X imposes a 10 percent rate of tax on dividends paid to Country X corporations by subsidiaries in which the recipient owns at least a 25 percent interest, and does not impose withholding tax on dividends paid by Country X corporations to foreign corporate shareholders that own at least an 80 percent interest in the dividend-paying corporation.

H Co finances a substantial part of its capital needs through loans from F FinCo, a Country Z subsidiary of Parent that finances the capital needs of many of the Parent group through third party bank borrowings. Based on H Co's needs, F FinCo borrows from third party banks, supported by H Co's guarantee and pledges of H Co assets, and relends the funds to H Co on parallel terms at an interest rate that is 10 percent higher than the rate charged to F FinCo by the relevant bank or bank syndicate (e.g., F FinCo would charge H Co. interest at 6.6 percent if the bank rate were 6.0 percent). F FinCo has a staff of experienced financial personnel that negotiates third party financing arrangements and performs risk management functions with respect to the group's financial position. However, most of the Parent group's capital needs are obtained through long-term (five years or longer) loans, the currency risks with respect to which are generally fully hedged up front. The Host Country income tax treaty with Country Z provides for a 0 percent source country tax on interest paid to residents of the other country, but only if that resident is the beneficial owner of the interest.

Under its sublicense with FIPCo, H Co pays royalties equal to 11.0 percent of its sales (which have averaged approximately $100 million/year) to FIPCo. Under its license with Parent, FIPCo pays Parent royalties equal to 10.0 percent of H Co's sales, which royalties FIPCo is entitled to deduct in calculating its Country Q taxable income. Under its income tax treaty with Country Q, Host Country imposes no withholding tax on royalties paid to residents of Country Q, provided that such residents are the beneficial owners of such royalties. Country Q does not impose a withholding tax on royalties paid by FIPCo to Parent.

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Beneficial Ownership

FACTS

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QUESTIONS

H Co's management is interested in the answers to the following questions:

1. Under Host Country law and/or Host Country interpretation of the Host Country-Country X Treaty, would F Holdco be considered the beneficial owner of the dividends paid by H Co? Assume for purposes of the answer that F Holdco qualifies as a resident of Country X under the relevant law or treaty provision and that it satisfies the requirements of a "qualified resident" (or equivalent designation) under any residence and limitation on benefits articles in the Host Country-Country X Treaty.
2. Under Host Country law and Host Country interpretation of the Host Country-Country Z Treaty, would F Finco be considered the beneficial owner of the interest paid by H Co? Assume for purposes of the answer that F Finco qualifies as a resident of Country Z under and satisfies the requirements of a "qualified resident" (or equivalent designation) under limitation on benefits articles in the Host Country-Country Z Treaty.
3. Under Host Country law and/or Host Country interpretation of the Host Country-Country Q Treaty, would FIPCo be considered the beneficial owner of the royalties paid by H Co? Assume for purposes of the answer that FIPCo qualifies as a resident of Country Q under the relevant law or treaty provision and that it satisfies the requirements of a "qualified resident" (or equivalent designation) under any residence and limitation on benefits articles of the Host Country-Country Q Treaty.

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Host Country
BELGIUM

Howard Liebman and Marilyn Jonckheere
Jones Day, Brussels

Introduction

For a term that is supposed to play such an important role in the allocation of treaty benefits and that is used in so many bilateral tax treaties, there is remarkably little jurisprudence on the meaning to be given to "beneficial ownership" under international tax law.[1] Indeed, even though Belgium includes the concept in many of its tax treaties, a definition or even a comprehensive clarification is still missing. When faced with the need to interpret the term in a specific context, Belgium typically seems to opt for a strict (one might even say, hyper-formalistic) legal approach to interpreting beneficial ownership, in contrast to an economic (or substantive) approach. Following from the latter and as further discussed below, it might be concluded that Belgium does not — at least at present — seem to consider tax treaty abuse to be one of the primary concerns in its development of international tax policy. M. Bourgeois and E. Traversa confirm this by stating that:

> Belgian authorities seem indeed to put more emphasis on the development of their tax treaty network, i.e. even by concluding conventions with low-tax jurisdictions, in order to attract foreign investments and to encourage businesses to structure their international activities so as to use Belgium as a base or a conduit country.[2]

I. Belgian approach to Beneficial Ownership

A. Formalistic approach to Beneficial Ownership

As most of Belgium's tax treaties follow the OECD Model Convention,[3] the concept of "beneficial owner" appears in many if not most of the tax treaties entered into by Belgium after 1977, as well as in Belgium's own Draft Model Convention of June 2007.[4] However, no clear-cut definition or explanation of the expression has yet to be provided by the Belgian tax authorities. Nor does domestic case law answer many of the critical questions surrounding the concept.

Because Belgium lacks any legal definition of beneficial ownership as well as definitive regulatory clarification by the Tax Administration, the interpretation of the term remains unclear. Consequently, both a substantive and a formalistic interpretation remain possible. However, most Belgian scholars share the view that a formalistic legal interpretation is to be applied to the expression, at least for the time being. As the concept of beneficial ownership has no meaning in Belgian private law, commentators tend to apply the classical interpretation of the concept of "legal ownership" of property under the Belgian Civil Code. They thereby conclude that the beneficial owner of income is the person holding title or another right *in rem* to property, allowing that person to claim the receipt of the income produced by that property on the basis of such title.[5] Thus, one of the foremost Belgian authorities, Professor Luc Hinnekens — after referring to those Belgian authors who have concluded that the notion of beneficial ownership generally excludes conduit companies from treaty benefits — has stated:

> We disagree with such economic interpretation of the concept and believe that it is rightfully not shared by the Belgian Administration. The OECD commentaries on this concept only refer to the case of a nominee or agent, i.e. a person who is not the beneficiary of the income in a true legal sense.[6]

Moreover, even the Belgian Administrative Commentary on Double Tax Treaties, as well as Article 117, § 6*bis* of the Royal Decree implementing the Belgian Income Tax Code 1992 (RD/BITC), shares this point of view by defining the beneficial owner as "the owner or usufructholder of the shares, securities, assets and rights,"[7] thereby focusing more on the legal dimension of pure ownership of title rather than adopting the broader economic or substantive (substance-over-form) interpretation that tends to characterise the view of Common Law tax authorities. In addition, this formal approach has been confirmed by Belgian case law, which has held that a person or company can only be a recipient of income if a right *in rem* (ownership or usufruct) exists with respect to the assets giving rise to the income.[8]

Some Belgian scholars, such as Professor Luc De Broe, feel that this approach, as generally adopted by the Belgian Government, facilitates treaty abuse and is therefore not in accordance with the object and purpose of the concept of "beneficial ownership." Professor De Broe, for example, argues that Belgian Courts should "find the autonomous treaty meaning of the term and not construe it in accordance with Belgian

domestic law."[9] But until they do so on a regular basis, then regardless of whether it makes for good public policy, one can still state that, under Belgian tax law, legal form prevails over what can be viewed as the economic substance of a transaction. Indeed, leaving aside some very recent legislative changes to be discussed below and still to be fleshed out, Belgian Courts are not even allowed or supposed to give priority to or take into account an economic or substantive reality that might be different from the legal form of the contracts entered into by the parties, unless these contracts are a sham and they, or their consequences, are not adhered to.[10]

As a result of this formalistic approach to the concept of beneficial ownership, withholding tax exemptions or reductions provided for in tax treaties are granted to conduit companies rather more easily and readily by Belgium than one might expect to see elsewhere.

B. Tax treaties and tax avoidance in Belgium

1. The taxpayer's freedom to choose the "least taxed route"

Until very recently, one of the cornerstones of Belgian tax law was the concept enunciated back in 1961, in a seminal decision of the Belgian Supreme Court in the *Brepols* case, that taxpayers have the right to structure their affairs in "the least taxed way" possible:[11]

> There is no sham, or, therefore, tax fraud, where, in order to enjoy a more favorable tax treatment, and using the freedom to contract, without however violating any legal obligation, the parties enter into acts of which they accept all the consequences, even if the form they give thereto is not the most usual one.[12]

With this statement, the Court affirmed the principle that there is no "simulation," and hence no tax fraud, when taxpayers exercise their freedom to conduct their affairs in such fashion as to benefit from a more favourable tax regime, as long as they accept all the legal consequences that arise as a result.[13] In 1990, the Belgian Supreme Court, in the *Vieux Saint Martin* case, not only confirmed this principle, but broadened its scope by stating that a legal construction would be upheld even if it appeared from the facts that the legal form had been chosen by the parties for the sole purpose of avoiding tax.[14]

After many, many years, and many, often fruitless, attempts by the tax authorities to challenge certain constructions in the courts, the absence of a general anti-abuse rule (GAAR) in the law finally prompted legislators to adopt one in July 1993, namely Article 344, § 1 of the BITC, which is discussed in the following section.

2. Compatibility of the GAAR with tax treaties

Article 344, § 1 of the BITC provides as follows:

> The legal characterisation given by the parties to an act or to separate acts which together realise the same operation may not be opposed to the tax authorities when those authorities determine, by presumptions or other proof, that this characterisation aims at avoiding taxes, unless the taxpayer proves that this characterisation is justified by legitimate needs of a financial or economic nature.[15]

Effectively, this general anti-abuse provision means that the formalistic legal characterisation of a transaction will *not* be binding on the tax authorities if its purpose is to "avoid" tax. The rule does not apply, however, when the taxpayer can prove that the transaction concerned is justified by "legitimate financial or economic" reasons. As this provision may also apply to cross-border transactions,[16] it can also be used by the tax authorities in situations in which taxpayers enter into genuine transactions, but with a specific legal characterisation that avoids or minimises taxation in connection with the application of one or more tax treaty provisions.

Both the tax authorities and the taxpayer must support their own respective burdens of proof under the GAAR. As a general matter, the tax authorities have, of course, the burden of going forward with the file and basically take the view that they have met their burden of proof that there has been a violation of the GAAR whenever two or more legal routes are available to reach a certain economic objective and the taxpayer has chosen the most tax-efficient one without giving any apparent economic justification for it. The taxpayer must then meet its burden of proof that it has not violated the GAAR by showing that the transaction is justified by legitimate economic or financial needs, even if tax-motivated.[17]

Despite the extra armament of this anti-abuse provision, as it has — in practice — been interpreted rather restrictively by Belgian Courts,[18] it is still rare for it to be successfully applied. Nevertheless, even if its successful application remains the exception rather than the rule, it does have an *in terrorem* effect and can never be overlooked by taxpayers and their advisors. For example, a recent judgment by one lower court stated that the existence of sound business needs (other than tax planning motives) is decisive in determining whether an interposed holding company can be disregarded by the application of Article 344, § 1 of the BITC.[19] As one commentator added, although not explicitly stated in the judgment, it appears that the Brussels Tribunal's view was that the GAAR could in fact be invoked in connection with the interposition of an intermediary company for withholding tax planning purposes.[20]

This rather unsuccessful trend in the jurisprudence might very well be subject to change in the near future, as the legislator amended the text of Article 344, § 1 of the BITC earlier this year.[21] Indeed, the amendment had the express purpose of making the GAAR more effective and easier for the tax authorities to apply. Now, actions taken or legal characterisations adopted by a taxpayer may *not* be utilized in support of the taxpayer's position *vis-à-vis* the authorities if such actions constitute "tax abuse." The amended Article 344 makes it clear that "tax abuse" includes those instances in which: the taxpayer (1) places itself outside the scope of a provision in the BITC; or (2) claims a tax benefit provided for in the BITC in a circumstance that runs contrary to the objectives of the law. In other words, a taxpayer's choice of the "least taxed route" can now, in and of itself, constitute "tax abuse," although the tax authorities must still prove that the

legal characterisation adopted by the taxpayer meets the definition of "tax abuse." Thereafter, of course, the taxpayer can still counter such an assertion by showing that the legal characterisation is justified by legitimate needs *other than tax avoidance*. In sum, acts carried out by the taxpayer solely for the purpose of enjoying tax benefits, or with limited non-tax driven motives, can fall under the definition of "tax abuse" referred to above.

Although how these recent changes will be applied in practice has yet to be determined, this new GAAR should have important implications for tax planning in the future. The amended Article 344, § 1 of the BITC becomes effective as of 2013, and is also applicable with regard to acts performed during the tax year concluded as from the date of publication of the law in the Belgian Official Gazette (April 6, 2012).

The position of the Belgian tax authorities as regards the relationship between domestic anti-abuse measures and tax treaties is relatively straightforward. In their official Commentary on Belgium's tax treaties, they have emphasised that no provision of a tax treaty restricts the rights of Belgium to apply its domestic anti-avoidance provisions.[22] Belgium thereby, in effect, equates or conflates treaty abuse with an abuse of domestic law.[23] However, given the fact that Article 344, § 1 of the BITC has so far rarely been successfully applied, its compatibility with tax treaty provisions has not yet been the subject of any challenge. Obviously, this state of affairs may change in view of the amendments made to Article 344 of the BITC discussed above.

Last but not least, it should be noted that Belgium does not include any explicit general anti-abuse provisions in its tax treaties, although Belgium's Draft Model Convention does contain such a provision for cases in which "the main purpose or one of the main purposes of a resident or a person connected with such resident was to obtain the benefits of the Convention."[24] It is yet to be determined whether this provision will remain in place if and when the Model Convention is finalised[25] but, as it does to an extent track the latest revisions to Article 344 § 1 of the BITC, it is likely to be used in treaty negotiations in active practice.

II. Application of Belgian rules

A. Dividends paid by HCo to FHoldCo

By adopting a Royal Decree in 2006[26] implementing the EC Parent-Subsidiary Tax Directive,[27] Belgium extended the application of its domestic withholding tax exemption: (1) to companies resident in a different EU Member State; and (2) even to companies resident in non-EU States (such as the United States and Japan) that have concluded a tax treaty with Belgium containing an exchange of information clause sufficient to allow for the execution of the domestic tax laws of both States. This new, broad, 0 percent withholding tax regime entered into effect for dividends distributed or made available for payment as from January 1, 2007.[28] In order for companies to benefit from this complex withholding tax exemption, certain additional criteria must be met. These requirements are listed below, set out in the format to be applied to the case at hand, namely with respect to the dividends paid by HCo to FHoldCo:

- the dividends must relate to a participation of at least 10 percent in the capital of the Belgian distributing company, with regard to dividends distributed or made available for payment as of January 1, 2009 (the threshold was 15 percent from January 1, 2007 until January 1, 2009). Since all of the stock of HCo is owned by FHoldCo, this requirement is met.
- the minimum participation referred to in the previous bullet point must be held for a period of at least 12 months, without interruption. Presumably, FHoldCo's participation in HCo has been held for at least 12 months, although this is not explicitly mentioned in the fact pattern;
- the Belgian distributing company, HCo, must have one of the corporate legal forms listed in the Annex to the EC Parent-Subsidiary Tax Directive. The beneficiary company, FHoldCo, if resident in an EU Member State, must also take one of those legal forms. If, instead, FHoldCo is a non-EU Member State company, but is nevertheless resident in a State with which Belgium has concluded a qualifying tax treaty, it will suffice that it has a legal form "similar to" one of those listed in that Annex. This would, for example, be the case if FHoldCo were an "Inc." resident in one of the states of the United States of America;[29]
- HCo and FHoldCo must have their fiscal residence in, respectively, Belgium and Country X;
- HCo must be subject to Belgian corporate income tax, while FHoldCo must be subject to corporate income tax or a similar tax in Country X and may not benefit from a special tax regime.[30]

Under the EC Parent-Subsidiary Tax Directive, it is not required that FHoldCo be the beneficial owner of the dividends distributed. Whereas some EU Member States, such as Spain and France, opted to add such a condition in their domestic legislation, the Belgian legislator did not. Hence, Belgium cannot refuse the benefit of the exemption from dividend withholding tax to conduit or intermediate companies, except in cases of fraud or where it can apply (successfully) its domestic GAAR provision.[31]

All that being said, the option to rely on the Belgian domestic withholding tax exemption might not always be available. Assuming that the tax treaty between Belgium and non-EU Country X does not include a (qualified) exchange of information clause, the transactions between HCo and FHoldCo will not fall within the scope of the dividend withholding tax exemption. In that case, the question of whether FHoldCo qualifies as the beneficial owner of the dividends paid by HCo may in fact prove to be of more relevance. However, if one takes into account the fact that FHoldCo does not act as a mere nominee, agent or fiduciary for the receipt of funds (but instead serves as a holding company for a group of operating companies within a multinational group), combined with the "legal reality" approach of Belgian tax law discussed above, it is fair to conclude that, on balance, FHoldCo will most likely be considered the beneficial owner of the dividends paid by HCo for these purposes. And of course, if there is no tax treaty in force and effect in the specific circumstances, then the issue will be of no

relevance, as full Belgian withholding tax will apply, regardless of who is the beneficial owner of the dividends.

Indeed, in his reply to a Parliamentary Question, the former Belgian Minister of Finance (Mr. D. Reynders) confirmed the point of view set out above.[32] Specifically, the former Minister was asked several questions regarding the tax treaty concluded between Belgium and Hong Kong in 2003. Given the fact that the Belgium–Hong Kong tax treaty is considered highly beneficial for taxpayers and includes no anti-abuse provisions, several Parliamentarians expressed their concern that it might open the door to treaty shopping. In addition, clarification was requested as to the meaning of "beneficial ownership." More specifically, reference was made to a potential structure whereby Belgian dividends were distributed by a Belgian company first to an intermediate Hong Kong company and thereafter to a Chinese (grand)parent company.[33] The then-Finance Minister replied by stating that if the Hong Kong company were the legal owner of the Belgian shares, it would qualify as the beneficial owner and would be entitled to full tax treaty benefits. By contrast, a person operating solely as a representative or agent for the account of the legal owner of the shares would not qualify as the beneficial owner. This is therefore the *de facto* dividing line that has been established and it has not yet been moved as of the date this article was written. The fact that companies might use such tax treaties as a means of minimising withholding tax on dividends by establishing intermediary companies was apparently not of concern to the policy makers in Belgium, who rather sought to take a pragmatic approach in order to render Belgium an attractive jurisdiction from which to conduct business, in part due to its tax treaty network and policy.

B. Interest paid by HCo to FFinCo

With regard to the international taxation of interest, Belgium, in its Draft Model Convention, provides for the sharing of tax revenue rather than reserving exclusive taxation for one or the other Contracting State. Based on Article 11 of the OECD Model Convention, this means that both the source State and the residence State are entitled to tax interest, subject to certain restrictions.

Article 11 of the Belgian Model provides as follows:

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such interest may also be taxed in the Contracting State in which it arises . . . but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.
3. a) Interest shall be *exempted from tax in the Contracting State in which it arises* if it is . . . interest paid in respect of a credit or loan of any nature granted or *extended by an enterprise to another enterprise*. . . .

[Emphasis added.]

Leaving aside the tax treaty envisaged in the fact pattern, Article 11(3)(a) of the Belgian Draft Model Convention specifically addresses the situation described in relation to the intercompany loans between HCo and FFinCo. It is also noteworthy that the OECD Commentary lists several examples of interest payments that may be exempted from source-country taxation, but does not include intercompany loans.[34] Even though the purpose of the OECD Commentary was not to provide an exhaustive list, the fact that Belgium chose to adopt this specific form of exemption is presumably illustrative of its view regarding intercompany loans and its unstated policy of continuing to encourage the use of Belgium as a corporate headquarters or treasury center, even after the demise of its coordination center regime (which links in with the opportunities afforded by its innovative Notional Interest Deduction regime). This is buttressed by the fact that the Belgian Model Convention provision does not even contain a beneficial ownership requirement.

Unfortunately, the tax treaty mentioned in the fact pattern prescribes a 0 percent source-country tax on interest paid to a resident of the other country, but only if that resident is the beneficial owner of the interest. This provision resembles Article 11 of the Belgium–United States tax treaty, which references the beneficial ownership concept as well. As one might expect in view of the ambiguity already surrounding this term, the Belgium–United States treaty does not provide for a definition of "beneficial ownership," so its precise implications are, once again, subject to debate. As previously mentioned, the position traditionally adopted by Belgium in this regard is that undefined terms should be interpreted in accordance with the tax laws of the country applying the particular treaty provision.[35]

As discussed in I., above, Belgium chooses to adopt a legal rather than an economic approach in this regard, which is of course to the benefit of the transactions carried out between HCo and FFinCo. Thus under a purely Belgian approach, FFinCo will most likely be considered the beneficial owner of the interest received, despite the presence of a beneficial ownership concept in the relevant tax treaty. As has also been noted, the Belgian Supreme Court has, on several occasions, respected transactions in which taxpayers have sought to take advantage of a more beneficial tax regime as long as they, in turn, have respected all the legal consequences of the structure and steps they have chosen.[36] Whether that view will continue to prevail in light of the new GAAR as opposed to Belgium's implicit policy goals remain to be tested.

In addition, there is always the possibility that the transactions between HCo and FFinCo may eventually be subjected to interpretations more closely aligned to those of the OECD. Several Belgian scholars, such as Professor De Broe, are in favour of this approach. In that regard, the following OECD Commentary could be considered of relevance with respect to the circumstances described in the Forum fact pattern:

A conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.[37]

FFinCo serves as an intermediary company between HCo (and many of the Parent group companies) and third party banks. The facts state that it has a staff of experienced financial personnel that negotiates third-party financing arrangements and performs risk management functions, even though most of the Parent group's capital needs are obtained from long-term loans, with currency risks being fully hedged upfront. Based on these facts, it could be discussed whether the real powers of FFinCo are narrow or whether the risk management functions performed by an experienced staff are sufficient to constitute a substantive activity that is more than that of a mere fiduciary or more than merely administrative in nature. Of course, the funds borrowed by FFinCo are supported by HCo's guarantee and the pledge of HCo assets, and the interest rate payable to FFinCo depends on the interest rate charged by the banks. Objectively, FFinCo is completely controlled by and dependant on HCo and the banks.

However, as indicated earlier, the current Belgium tax system intentionally grants priority to legal reality over economic substance. Thus, on balance, it might very well be the case that the Belgian Tax Administration would not seek to deny treaty benefits to FFinCo with regard to the transactions concerned, as long as both parties accepted the legal consequences of their transactions, or if it did (for example, under the amended GAAR), that any such attack would not survive judicial review in view of the substantive and substantial, real economic activities being performed by FFinCo, which should enable HCo to adduce sufficient legitimate non-tax avoidance purposes in support of the structure.

C. Royalties paid by HCo to FIPCo

The treaty provision referred to in the Forum fact pattern resembles the provision on royalties in Article 12(1) of the Belgian Draft Model Convention:

> Royalties arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State if such resident is the beneficial owner of the royalties.

This exclusive right for the residence State to tax royalties is provided for in the Belgium–United States tax treaty as well as in the tax treaties concluded by Belgium with other EU Member States. Although this is not specified in relation to the treaty in the fact pattern, the tax treaties concluded by Belgium generally do not condition a royalty withholding tax exemption on the royalties being subject to tax in the residence State.[38] Thus, the fact that Country Q does not impose a withholding tax on royalties paid by FIPCo to Parent should not create an issue.

The question of whether FIPCo qualifies as the beneficial owner of the royalties paid by HCo leads to a discussion similar to that concerning interest. In the current context, it would be highly unlikely for FIPCo to be challenged by the Belgian authorities as the beneficial owner under the Belgium–Country Q tax treaty. Given the fact that FIPCo fulfills a certain role by overseeing the registration of the intellectual property (IP) and that it manages the efforts to ensure that such IP rights are enforced against potential infringers, FIPCo should not be subject to attack, in the context of the current Belgian standards for adjudging tax treaty abuse. Indeed, it should not even fall afoul of the three categories of persons to be expressly considered *non*-beneficial owners: (1) intermediaries receiving income in the name and for the account of a third party (such as agents); (2) mere fiduciaries; and (3) administrators acting on account of third parties.[39] FIPCo's qualification as the beneficial owner of the royalties is further supported by the fact that it earns a substantial profit under the sublicense agreement, a profit that appears from the fact pattern to be in excess of what an independent third party would be willing to pay to a mere agent, fiduciary or administrator. Of course, all bets are off under the amended GAAR discussed above. Still, the fact pattern is such as to lead the authors to believe that the taxpayer in this situation could mount a strong defence and meet its burden of proving that there is no "tax abuse" at stake in the structure it has chosen to use.

NOTES

[1] C. Du Toit, Beneficial Ownership of Royalties in Bilateral Tax Treaties 145 (1999).

[2] M. Bourgeois and E. Traversa, *Tax Treaties and Tax Avoidance: Application of Anti-avoidance Provisions — Belgium*, 95a Cahiers de Droit Fiscal Int'l (International Fiscal Association) 127, 128 (2010).

[3] OECD Model Convention, Art. 10(2) of refers to "beneficial ownership".

[4] M. Bourgeois and E. Traversa, fn. 2, above, at 145.

[5] L. De Broe, *International Tax Planning and Prevention of Abuse*, 14 IBFD Doctoral Series 669 (2008).

[6] L. Hinnekens, *The Application of Anti-Treaty Shopping Provisions to Belgium Co-ordination Centres*, [1989/8-9] Intertax 359.

[7] Belgian Com. DTC, at paras. nos. 10/204 & 231, 11/204, 226/5 & 231; 12/203 & 231.

[8] *See, e.g.*, Judgement of June 29, 1982 (Brussels Ct. App.), FJF 1982, 202, as referred to in IBFD, *Country Survey – Belgium* 62, 81 (Dec. 2005), at *http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/ir_dir_be_en.pdf*.

[9] L. De Broe, fn.5, above, at 715.

[10] J. Kirkpatrick, Le régime fiscal des societies en Belgique, 1995, §§ 1.23-1.26.

[11] Judgment of June 6, 1961 (S. Ct.), Pas., 1961, I, at 1082.

[12] Informal translation provided in M. Bourgeois and E. Traversa, fn. 2, above, at 129.

[13] H. Liebman and A. Gabriel, *Anti-Abuse and Anti-Avoidance Doctrines — Host Country: Belgium*, 16 Tax Management Int'l F. 3, 4 (Sept. 1995).

[14] Judgment of March 22, 1990 (S. Ct.), Pas., 1990, I, at 853.

[15] Informal translation provided in L. De Broe, fn. 5, above, at 158.

[16] P. Faes, Het Rechtsmisbruik in Fiscale Zaken: Artikel 344 § 1 WIB – 15 jaar later 243 (2008).

[17] H. Liebman and A. Gabriel, fn. 13, above, at 5.

[18] Judgment of Nov. 22, 2007 (S. Ct.), T.B.O., 67-72 (2008); Judgment of May 11, 2006 (S. Ct.), T.F.R., 556-561 (2007); Judgment of Nov. 4, 2005 (S. Ct.), FJF, afl. 1, 64 (2006).

[19] Brussels Court of First Instance, Dec. 2009.

[20] In point of fact, however, the taxpayer prevailed in this case by proving up the following justified and justifiable business purposes: "(i) the need to shield personal liability, (ii) the need to ensure the liquidity and flexibility of

the investment by having the possibility to transfer the shares and financing (bonds) to third parties and (iii) the need to ensure that no investor could block the sale of the (Belgian) target. The possibility to sell the target shares was also vital for the financing bank." G. Goyvaerts, *Protection of the Corporate Income Tax Base – National Report Belgium* at p. 3, IBA Vancouver (2010).

[21] Belgian Programme Law of March 29, 2012, Belgian Official Gazette of April 6, 2012, at p. 22143, *amending* BITC 1992, Art. 344, § 1.

[22] Belgian Com. DTC, at paras. nos. 28/17 and 9/3 & 5.

[23] L. De Broe, fn. 5, above, at 461.

[24] Belgian Draft Model Convention of June 2007, Art. 27.

[25] M. Bourgeois and E. Traversa, fn. 2, above, at 143.

[26] RD of Dec. 21, 2006, Belgian Official Gazette Dec. 29, 2006, at 76357, embodied in BITC 1992, Art. 226.

[27] EC Parent-Subsidiary Directive of July 23, 1990 (90/435/EEC), O.J. No. L/225, at 6 (Aug. 20, 1990), *as amended* by the EC Directive of Dec. 22, 2003 (2003/123/EC), O.J. No. L/007, at 41 (Jan. 13, 2004).

[28] G. Bombeke and A. Huyghe, *Dividends*, in A. Van de Vijver, ed., The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective 171, 184 (2008).

[29] Note that limited liability companies and other hybrids or pass-through entities present separate issues and are subject to additional tests for treaty qualification.

[30] Circ. No. 233/586.864 of June 23, 2011, discussed in *Roerende voorheffing. Vrijstelling. Deelnemingsdividenden*, Fisc. No. 1260, at 10 (Aug. 24, 2011). The scope of what is to be considered "special" is of course open to interpretation, but generally relates to a regime that is unusual from a *Belgian* tax perspective.

[31] G. Bombeke and A. Huyghe, fn. 28, above, at 190.

[32] Parl. Question 06/802 of Mr. Devlies, dated March 28, 2006, at: *http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&nav=1&id=a515e177-dbd0-44d8-aee2-c45285b31464&disableHighlightning=false#findHighlighted*.

[33] As the Belgium–China (PRC) tax treaty of April 18, 1985 has been superseded by a treaty signed on Oct. 7, 2009 that contains a standard Exchange of Information clause in Art. 26, it now also falls under the scope of Belgium's unilateral dividend withholding tax exemption. Thus, transactions that meet the other requirements for that regime will now be exempted from withholding tax as well. Hence, the hypothetical involving the use of intermediate Hong Kong companies to invest in and out of the PRC will — in most cases (since not all transactions fall under the domestic withholding tax exemption) — no longer be of relevance. (Note that the Parliamentary Question referred to above was submitted before the new Belgium–China (PRC) tax treaty was signed and, in any event, the latter is still not in effect.)

[34] *See http://fiscus.fgov.be/interfafznl/fr/downloads/ocde_en.pdf*.

[35] Muyldermans, K. De Haen and N. Hostyn, *Het begrip 'uiteindelijk gerechtigde' naar (Belgisch) fiscaal recht: juridische invulling houdt stand*, A.F.T. 2002, at p. 359.

[36] Judgment of June 6, 1961 (S. Ct.), Pas., 1961, I, at 1082; Judgment of Oct. 19, 1965 (S. Ct.), Pas., 1966, I, at 230-234; Judgment of March 22, 1990 (S. Ct.), Pas., 1990, I, at 853.

[37] OECD Model Tax Convention on Income and on Capital (updated 2010), Commentary on Art. 10, at para. 12.1, *http://dx.doi.org/10.1787/978926417517-en*.

[38] E. Schoonvliet, *Royalties*, in A. Van de Vijver, ed., The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective 245, 246 (2008).

[39] J. Van Gompel, *Interest*, in A. Van de Vijver, ed., The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective 205, 218 (2008), *citing to* the legislative history of the U.S.-Belgium Tax Treaty, as reported in Belgian Chamber session 2006-2007, April 16, 2007.

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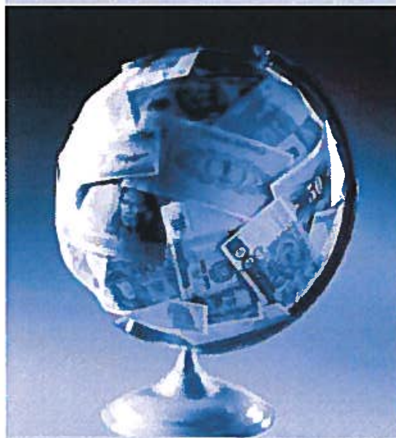

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