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The New US-Belgium Double Tax Treaty

A Belgian and EU perspective

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Members of Diplomatic Missions and Consular Posts

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1. Introduction

27.1. The text of Article 27 is similar to the text pertaining to the members of diplomatic missions and consular posts under the old US-Belgium treaty³. It is identical to Article 27 of the OECD Model Convention and similar to Article 27 of the US Model Convention.

27.2. Whereas the old Treaty referred to “privileges of diplomatic and consular officials”, the new Treaty refers to “privileges of members of diplomatic missions or consular posts”, but such change, as a result of which the Article was adapted to the Vienna Conventions on Diplomatic Relations and Consular Relations, does not entail a substantive change to the provision⁴.

2. The provision

2.1. *“Nothing in this Convention shall affect the fiscal privileges”*

27.3. The aim of the provision is to confirm that any fiscal privileges to which members of diplomatic missions or consular posts are entitled under the general rules of international law or under the provisions of special agreements will apply, notwithstanding any provisions to the contrary in the Treaty⁵. In other words, where the rules of general international law or the provisions of special agreements conflict with those of the Treaty, the former have precedence. Members of diplomatic missions and consular posts will thus never receive less favourable treatment than that to which they are entitled under international law⁶.

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³ Art. 27(1) of the old Treaty: “Nothing in this Convention shall affect the fiscal privileges of diplomatic and consular officials under the general rules of international law or under the provisions of special agreements”.

⁴ K. VOGEL, *Klaus Vogel on Double Taxation Conventions*, Kluwer Law International, 1997, 3rd edition, p. 1456.

⁵ US Model Technical Explanation (2006), 15 November 2006, comments on Art. 27.

⁶ OECD Commentary on Art. 27(1).

Conversely, where the Treaty confers a greater benefit than the general rules of international law or the provisions of special agreements, members of diplomatic missions and consular posts can claim the benefit of the Treaty⁷. The simultaneous application of the provisions of the Treaty and of diplomatic and consular privileges may lead to double non-taxation. The Treaty does not contain a general provision avoiding such double non-taxation⁸.

2.2. "Under the general rules of international law or under the provisions of special agreements"

27.4. General rules of international law governing the fiscal privileges of members of diplomatic missions or consular posts may be found either in multilateral conventions or in customary law. In that it equally refers to international custom, Article 27 potentially has a wider scope than Article 1(2)(b) of the Treaty, according to which any benefits granted "by any other agreement to which the Contracting States are party" remain unaffected. In practical terms, however, the general rules referred to in Article 27 are laid down in the 1961 Vienna Convention on Diplomatic Relations ("VCDR") and the 1963 Vienna Convention on Consular Relations ("VCCR"), to which both the United States and Belgium are parties.

Provisions of special agreements within the meaning of Article 27 may be found in the Consular Convention between the United States and Belgium of 2 September 1969, which, though differently worded, is substantially to the same effect as the VCCR.

2.3. "Members of diplomatic missions"

27.5. Pursuant to Article 1 VCDR, the "members of the mission" are the head of the mission and the members of the staff of the mission (Art. 1(b)). The latter include the members of the diplomatic staff, as well as of the administrative and technical staff and of the service staff of the mission (Art. 1(c) – see also the further definitions under (d), (f) and (g)). The head of the mission and other members of the staff having diplomatic status are referred to as "diplomatic agents" (Art. 1(e)).

Under Article 34 VCDR, a diplomatic agent shall, in principle, be exempt from all dues and taxes, personal or real, national, regional or municipal. Exceptions to this principle which are within the ambit of the Treaty are "(d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State". Sala-

⁷ US Model Technical Explanation (2006), 15 November 2006, comments on Art. 27.

⁸ The OECD Commentary on Art. 27 suggests that contracting states wanting to avoid such double non-taxation adopt bilaterally the following additional provision: "Insofar as, due to fiscal privileges granted to members of diplomatic missions and consular posts under the general rules of international law or under the provisions of special international agreements, income or capital are not subject to tax in the receiving State, the right to tax shall be reserved to the sending State". The Treaty does not contain that provision.

ries paid to the diplomatic agent by the sending state are not private income having its source in the receiving state within the meaning of Article 34 VCDR. They shall therefore be exempt from taxes in the receiving state.

As an exception to this principle, lest additional privileges be granted by the receiving state, a diplomatic agent who is a national of, or permanently residing in, the receiving state is not exempt from taxes under the VCDR (Art. 38.1).

Pursuant to Articles 37.2 and 38.2 VCDR, the same tax exemption regime applies to members of the administrative and technical staff of the mission. Members of the service staff of the mission who are not nationals of, or permanently residing in, the receiving state enjoy a tax exemption for dues and taxes on the emoluments they receive for reason of their employment (Art. 37.3 VCDR).

2.4. "Members of consular posts"

27.6. Pursuant to Article 1.1 (a) VCCR, a "consular post" includes any consulate-general, consulate, vice-consulate or consular agency. The term "members of the consular post" refers to consular officers, consular employees and members of the service staff (Art. 1 (g)). Consular officers include any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions (Art. 1.1 (d)), and may be either career consular officers or honorary consular officers (Art. 1.2). "Consular employee" means any person employed in the administrative or technical service of a consular post (Art. 1.1 (e)) and "member of the service staff" any person employed in the domestic service of a consular post (f).

Under the VCCR, career consular officers and consular employees are exempt from all dues and taxes, personal or real, national, regional or municipal, except "dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State" (Art. 49.1 (d)). Members of the service staff are exempt from dues and taxes on the wages which they receive for their services (Art. 49.2).

Pursuant to Article 57.2 VCCR, such exemptions shall not be accorded (a) to consular employees or to members of the service staff who carry out any private gainful occupation in the receiving state, (b) to members of the family of the former or to members of their private staff, and (c) to members of the family of a member of a consular post who themselves carry out any private gainful occupation in the receiving state.

Honorary consular officers shall, in turn, be exempt from all dues and taxes on the remuneration and emoluments which they receive from the sending state in respect of the exercise of consular functions (Art. 66).

Except insofar as additional facilities, privileges and immunities may be granted by the receiving state, members of the consular post who are nationals of, or permanently residing in, the receiving state, do not enjoy any tax exemption (Art. 71).

2.5. Fiscal privileges not mentioned in Article 27

27.7. The VCDR and the VCCR also provide for tax exemptions in favour of the family of members of diplomatic missions and consular posts (Art. 37 VCDR; Art. 49, 57.2 and 58 VCCR). On 18 March 2004, the United States and Belgium entered into an Agreement concerning the gainful occupation of certain family members of diplomatic and consular staff, which is limited to referring to the tax regime of the VCDR (Art. 5).

Family members are not mentioned in Article 27 of the Treaty, but Article 1(2)(b) of the Treaty would nevertheless prevent their fiscal privileges from being affected by the Treaty. In practice, however, it is unlikely, if not outright excluded, that family members' tax exemptions be affected by the Treaty, since even for family members enjoying the largest tax exemptions, no such exemption applies to dues and taxes on private income having its source in the receiving state and capital taxes on investments made in commercial undertakings in the receiving state or in financial undertakings in that state (Cf. Art. 34 (d) VCDR and Art. 49.1 (d) VCCR; Agreement of 18 March 2004 concerning the gainful occupation of certain family members of diplomatic and consular staff, Art. 5), and since no exemptions whatsoever apply to family members who are nationals of, or permanently residing in, the receiving state (Art. 37 and 38 VCDR; Art. 71 and 49 VCCR).

27.8. Another category of persons not mentioned in Article 27 is the staff of international organizations and members of permanent missions to international organizations, who benefit from tax exemptions under multilateral treaties entered into by the member states of the organizations concerned or under host state agreements between the host state and the organization itself. This is the case, for instance, of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, signed in Ottawa on 20 September 1951. Insofar as they are provided for in agreements to which both the United States and Belgium are parties, these tax exemptions are bound to remain unaffected by the Treaty pursuant to Article 1(2)(b). In the quite unlikely hypothesis that either the United States or Belgium would not be a party to such an agreement, privileges would equally remain unaffected, since such regimes benefit subjects of international law who are not parties to the Treaty and to whom the Treaty can, therefore, not be opposed (*Pacta tertiis nec nocent nec prosunt*; 1969 Vienna Convention on the Law of Treaties, Art. 34).

Entry into Force

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28.1. Article 28 provides when the Treaty and its provisions enter into force. As regards the Treaty, Article 28 provides that it enters into force on the date on which both states (i.e. Belgium and the United States) have received the notification from the other state that it has completed the required ratification procedures as provided for in Article 28(1). On 28 December 2007, Belgium was the last state to receive such notification from the United States and, accordingly, the Treaty entered into force on the same date.

The provisions in respect of taxes withheld at source have effect for amounts paid or credited on or after the first day of the second month following the date on which the Treaty enters into force, i.e. on or after 1 February 2008. The provisions in respect of other taxes have effect for taxable periods beginning or ending on or after the first day of January following the date on which the Treaty enters into force, i.e. beginning or ending on or after 1 January 2008.

28.2. Article 28 further provides that Article 21(5)(f) has no effect until 1 January 2011 (Art. 28(3)). The latter provision relates to the so-called "headquarter test" under the Limitation of Benefits Article and requires that, in order to benefit from the Treaty, the headquarters company be subject to the generally applicable income taxation rules in its residence state. The delayed entry into force means that Belgian coordination centres, which benefit from a special tax regime, may still qualify for the headquarters test until 1 January 2011 (which also corresponds to the date that the special tax regime will cease to exist, as a result of prior legal actions taken by the EU Commission)². For a detailed analysis of the headquarter test we refer to Chapter XXI (Para. 21.30.-21.36.).

28.3. The old Treaty, in principle, ceases to have effect as of the date on which the new Treaty has effect (Art. 28(4)). However, the Treaty also includes a grandfathering provision according to which the old Treaty continues to have effect for a twelve-month period from the date on which the provisions of the new Treaty would have effect (cf. paragraph 28(1)) where a person would have been entitled to a greater benefit under the old Treaty than under the new Treaty. The application of the grandfathering provision is subject to election (Art. 28(5)).

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² Explanatory memorandum, Belgian Senate session 2006-07, 3-2344/1, 26 March 2007, 33-34.