16.
Belgium

Introduction
The Belgian tax authorities turned their attention towards transfer pricing in the early 1990s. Belgium has become more aggressive in the field of transfer pricing as it has become increasingly aware of the active interest adopted (typically) in the surrounding countries and the risk of seeing Belgium's taxable basis eroded. This focus on transfer pricing resulted in the issuing of a Dutch/French translation of the 1995 Organisation for Economic Co-operation and Development (OECD) Guidelines (and the 1996, 1997 and 1998 additions thereto) and of a revenue document that comments on the 1995 OECD Guidelines and serves as an instruction to tax auditors. As of 1 January 2003, the Belgian government also introduced a new broadened ruling practice aimed at providing foreign investors upfront certainty regarding their ultimate tax bill. In 2004, further changes to the ruling procedure were made to enhance a flexible cooperation between taxpayers and the Ruling Commission. A specialist transfer pricing team has been established and, in 2006, the Belgian tax authorities also installed a special transfer pricing investigation squad. Finally, during 2006, the Belgian government issued a second transfer pricing practice note endorsing the EU Code of Conduct on transfer pricing documentation.

Statutory rules
The Belgian Income Tax Code (ITC) did not provide specific rules on inter-company pricing until mid-2004, with the formal introduction of the arm's-length principle in a second paragraph to Article 185 of the ITC.

In addition, the authorities can make use of other more general provisions in the ITC to challenge transfer prices. For example, in some cases where the Belgian tax authorities raise the issue of transfer pricing, the general rules on the deductibility of business expenses are invoked. Furthermore, the ITC contains provisions that tackle artificial inbound or outbound profit shifting. These are the so-called provisions on abnormal or gratuitous benefits.

Arm's-length principle
In 2004, Article 185 of the ITC was expanded to include the arm's-length principle in Belgian tax law for the first time. Article 185, paragraph 2 of the ITC allows for a unilateral adjustment to the Belgian tax basis, similar to the corresponding adjustment of Article 9 of the OECD Model Tax Convention. The underlying assumption is that, in case of downward adjustment, the 'excess profit' forms part of the profits of the foreign-related-party. The Ruling Commission has to agree which part of the profit is deemed to be derived from the related party dealings and how the 'part of the profits of the foreign related party' condition should be interpreted. Various rulings on this topic have been issued in the meantime.

B

Deductibility of expenses

General rules

The general rule concerning the deductibility of expenses is contained in Article 49 of the ITC. This article stipulates that a tax deduction is allowed only if an expense is incurred for the benefit of the taxpayer and is connected with the taxpayer's business activity. This connection must be demonstrated by the taxpayer. The expense itself must be real and necessary; incurred to obtain and retain taxable income; and be paid, accrued or booked as a definite and fixed liability during the taxable period.

Excessive expenses

As a matter of principle, the tax authorities and courts may not test whether a business decision was expedient. Although the company bears the burden of proof that expenses are necessarily linked with its operations or functions, the authorities have no right to question whether the expenses are useful or appropriate. However, Article 53 of the ITC provides that relief may be denied for any excessive expenses incurred, and this will be the case if the expense is not reasonable in light of the activities carried out. No case law exists on the application of this article in the context of transfer pricing.

Interest payments

Article 55 of the ITC provides that interest paid is a tax-deductible business expense, provided that the rate of interest does not exceed normal rates after taking into account the specific risks of the operation. (*See also section on Thin capitalisation*)

Abnormal or gratuitous benefits

Article 26 of the ITC provides authority for the taxable profits of enterprises in Belgium to be increased where the authorities can demonstrate that any profit transfers were 'abnormal or gratuitous benefits' granted to individuals or companies established in Belgium or abroad. This does not apply if the benefits transferred are subject to (Belgian) tax in the hands of the recipient(s). Although this article seems to have become obsolete because of the formal introduction of the arm's-length principle in Belgian tax law by Article 185, paragraph 2 of the ITC, this is not true for situations where the latter article does not apply. This may, for example, be the case for pure Belgian transactions where the recipient of the benefit is not subject to taxation on said advantage.

The Belgian ITC does not define 'abnormal or gratuitous benefits' and, consequently, the issue has been subject to review in the courts. Case law suggests that 'abnormal' refers to 'that which is not consistent with common practice', while 'gratuitous' refers to the fact that a benefit is not granted in the course of the execution of a contractual obligation, but is granted where there is none or insufficient consideration (Court of Cassation, 31 October 1979, NV Regents Park Co Belgium, Bull. Bel. 590).

The Belgian legislature inserted in Article 26 paragraph 1 of the ITC the following wording: 'notwithstanding the application of Article 49'. This means that the application of Article 26 of the ITC does not exclude the application of Article 49 of the ITC. In other words, even if the abnormal or gratuitous benefit is taken into account for determining the taxable basis of the beneficiary, the tax deductibility of the related expenses can still be denied in the hands of the grantor. This could result in economic double taxation. This provision has come into play as of tax year 2008.

Article 207 of the ITC provides that a Belgian company that receives (directly or indirectly) abnormal or gratuitous benefits from a company upon which it is directly or indirectly dependent may not use any current year losses or losses carried forward, nor may it apply the participation exemption, investment deduction or notional interest deduction (NID) against the taxable income arising from the benefit. In an answer to a parliamentary question (L. Van Campenhout, 2 April 2004), the Belgian Minister of Finance has given a very broad interpretation to this provision by declaring that in the case of received abnormal or gratuitous benefits, the minimum taxable basis of the receiving company equals at least the amount of the benefit. The previous administrative tolerance under which abnormal or gratuitous benefits received from abroad were not tackled has been abolished as of tax year 2004.

Anti-abuse regulation

Under the Programme Act of 29 March 2012, a new general anti-abuse provision was introduced in Belgian tax law applicable as of tax year 2013 – income year 2012 (with some exceptions). The revised Article 344, §1, of the ITC contains this general anti-avoidance rule. Under the previously applicable general anti-abuse provision, the Belgian tax authorities could reclassify a legal deed (transaction) into a different transaction provided that both transactions had the same/similar legal consequences. Due to the latter condition, the old rule in most cases proved to be inadequate to recharacterise transactions on the basis that they did not make commercial sense (commercially rational).

The new wording of article 344 §1 ITC now clearly provides that a transaction (in other words a legal action [or a chain of legal actions]) is not opposable towards the tax authorities if the tax authorities can demonstrate that there is tax abuse.

For the purpose of the anti-abuse rule, ‘tax abuse’ is defined as:

- a transaction in which the taxpayer places himself – in violation with the purpose of a provision of the ITC – outside the scope of this provision of the ITC
- a transaction that gives rise to a tax advantage provided by a provision of the ITC whereby getting this tax advantage would be in violation with the purpose of this provision of the ITC, and whereby getting the tax advantage is the essential goal of the transaction.

In case the tax authorities uphold that a transaction can be considered as tax abuse, it is up to the taxpayer to refute that the choice for the legal action or the whole of legal actions is motivated by other reasons than tax avoidance (reversal of burden of proof). In case the taxpayer cannot refute this, the administration can reclassify the transaction or the whole of transactions into another transaction. The transaction will be subject to taxation in line with the purpose of the ITC, as if the abuse did not take place.

Please note that the extent of this new anti-abuse rule is still uncertain. Notwithstanding the fact that the Belgian tax authorities published administrative commentaries on May 4, 2012 (Circular letter Ci.RH.81/616.207) on the new anti-abuse rule, no clear examples have been given in this respect. However, in the parliamentary works (DOC 53 2081/016) with respect to the new anti-abuse rule, the Belgian Minister of Finance stated that taxpayers will still be free to choose the structure with the lowest tax burden provided that there is no tax abuse.

Notional interest deduction

On 22 June 2005, the Belgian tax law on the notional interest deduction was passed.

These rules are intended first to ensure equal treatment of debt and equity funding, and, second, to provide a successor to the Belgian coordination centres regime.

Companies liable to Belgian corporation tax (including Belgian branches of foreign companies) are granted a notional interest deduction equal to the 10-year state bond rate on the equity shown in the company's individual Belgian financial statement. The equity requires slight alteration (e.g. holdings in subsidiary companies [inter alia] are to be trimmed off in assessing the relevant equity figure).

To the extent that the interest deduction does not have a direct tax effect (e.g. in loss situations), the interest deduction can be carried forward for the next seven years. The measure thus allows obtaining tax relief for what is deemed an arm's-length interest rate calculated on the adjusted equity for which no charge is reported in the profit and loss statement.

However, on 20 July 2012, the council of ministers approved the limitation of the carry forward of excess NID. This Bill (draft law) was sent over to the Chamber. Currently, the bill is not yet published and not yet approved by the Chamber. Although the limitation of the carry forward of excess NID is currently not yet final law, it is expected that it will become final law. According to the Bill, carrying forward excess NID is no longer possible. Whereas excess NID could be carried forward for seven years (as explained above), the Bill proposes to abolish the carry forward of excess NID generated as of tax year 2013 (financial years closing between 31 December 2012 and 30 December 2013, both dates inclusive).

Although the Bill introduces this strict limitation, it also introduces a Grandfather clause for the current existing 'stock' of excess NID. This is in relation to the excess NID existing in the hands of a Belgian company or branch at the end of tax year 2012 (financial years closing between 31 December 2011 and 30 December 2012, both dates inclusive).For the application of this Grandfather clause three conditions must be met, this includes (i) the existing stock of excess NID can only be offset against the profit that remains after all other tax deductions have been applied (dividends received deductions, patent income deductions, current year NID, carry forward tax losses, and investment deductions), (ii) the existing stock of excess NID can be deducted from the first tranche of euro (EUR) 1 million of the taxable profit remaining after the deductions listed in first condition have been applied. If the taxable profit exceeds EUR 1 million, an additional amount of stock of excess NID can be offset, corresponding to 60% of the taxable profit that remains after the first tranche of EUR 1 million has been used, and (iii) the existing stock of excess NID can be carried forward as provided in the current rules, i.e. for a maximum seven years. However, the portion of excess NID that cannot be used due to the 60% limitation – i.e. 40% of the taxable profit remaining after all other tax deductions and after deductions of the first tranche of EUR 1 million of the excess NID – can be carried forward indefinitely.

For budgetary reasons, the notional interest deduction rate for tax years 2012 (3,425%) and 2013 (i.e. financial years ending between 31 December 2012 and 30 December 2013, both dates inclusive) has been capped at 3% (3.5% for small and medium-sized companies).

Small and medium-sized companies, as defined for Belgian company law purposes, are allowed to raise the reference interest rate by 0.5%. However, they have to make the choice between the current system of an investment reserve and the notional interest deduction. They are not allowed to apply both incentives.

Patent income deduction

On 27 April 2007, the Belgian parliament approved the law introducing a tax deduction for new patent income (PID) amounting to 80% of the income, thereby resulting in effective taxation of the income at the maximum rate of 6.8%.

To benefit from the PID, the Belgian company or branch can exploit the patents owned by it, or licensed to it, in different ways.

A first option available to the Belgian company or branch is to licence the patents or extended patent certificates to related and unrelated parties.

Alternatively, the Belgian company or branch can exploit the patents by manufacturing, or having manufactured by a contract manufacturer, products in which the patents are used and supply the products to related or unrelated customers. It may also use the patents in the rendering of services.

For patents licensed by the Belgian company or branch to any related or unrelated party, the PID amounts to 80% of the gross licence income derived from the patents and patent certificates, to the extent the gross income does not exceed an arm's-length income. The PID applies to variable and fixed patent licence fees as well as other patent income, such as milestone payments.

For patents used by the Belgian company or branch for the manufacture of patented products – manufactured by itself or by a contract manufacturer on its behalf – the PID amounts to 80% of the patent remuneration embedded in the sales price of patented products. In the case of services, the PID amounts to 80% of the patent remuneration embedded in the service fees.

The new tax measure is aimed at encouraging Belgian companies and establishments to play an active role in patent research and development, as well as patent ownership. The tax deduction is to apply to new patent income and has come into force as of financial years ending on or after 31 December 2007.

Administrative guidelines

Initial guidelines

On 28 June 1999, administrative guidelines were issued relating to transfer pricing. The guidelines are broadly based on the OECD Guidelines. The reason for issuing the guidelines is of a purely 'offensive' nature. The guidelines stipulate that Belgium risks being forced to make corresponding downward profit adjustments if no adequate measures are taken to counterattack aggressive revenue action in other countries.

Although no specific penalty rules are imposed, the guidelines urge tax inspectors to carry out in-depth transfer pricing audits where the taxpayer fails to show 'documentary evidence' that efforts have been made to fix arm's-length inter-company prices. Consequently, taxpayers may benefit from preparing a defence file upfront, substantiating their transfer pricing methodology. In addition, the guidelines underscore the importance of conducting a proper functional analysis and refer to a list of generic functional analysis questions.

B

Guidelines on Arbitration Convention

On 7 July 2000, the Belgian tax authorities issued administrative guidelines on the technicalities of applying the Arbitration Convention. The guidelines offer guidance to taxation officers and tax practitioners into how the tax authorities will apply the Convention. It is also an acknowledgement by the Belgian tax authorities of the need to develop an efficient practice to resolve issues of international double taxation.

Guidelines on transfer pricing audits and documentation

Introduction

The Belgian tax authorities published, in November 2006, administrative guidelines on transfer pricing audits and documentation.

In light of certain developments, such as the formal set-up of a specialist transfer pricing investigation squad and the approved EU Code of Conduct on transfer pricing documentation, the need had obviously arisen in Belgium for an update of the previous transfer pricing administrative guidelines and for new guidance, particularly on transfer pricing audits and documentation requirements. The 2006 administrative guidelines fill this need and, at the same time, confirm the integration in Belgian tax practice of the EU Code of Conduct. The Code of Conduct is added as an appendix to the administrative guidelines.

Cases with a higher risk of prompting an audit

The administrative guidelines contain a list of cases (which is not exhaustive) where 'it may be advisable' to check the transfer pricing practices. Among the situations listed in the administrative guidelines are transactions with tax havens and low-tax jurisdictions, back-to-back operations, and so-called guidelines/conduit structures, as well as situations that are much more frequent (i.e. entities that suffer structural losses, business reorganisations or migrations and the charge-out of management fees).

Pre-audit meeting

The administrative guidelines acknowledge the fact that an investigation into the transfer pricing dealings of a business and the related documentation form a complex whole and are significantly affected by widely diverse company-specific factors. To this end, the administrative guidelines suggest the possibility of holding a 'pre-audit meeting' before issuing any transfer pricing questionnaire. The purpose of this pre-audit meeting is to explore, in consultation with the taxpayer, what should be the appropriate scope of the tax audit, what documentation is relevant to the transfer pricing investigation, if there is any readily available documentation, etc.

Concept of 'prudent business manager'

As to the question of what proactive effort is required when putting together transfer pricing documentation, the administrative guidelines refer to the concept of a 'prudent business manager' (i.e. given the nature of the transactions that take place between related companies, it is only normal, as a 'prudent business manager', to maintain written documentation that underpins the arm's-length character of the transfer pricing applied).

The administrative guidelines list the information that can be prepared to this end.

Flexibility as to the language of the documentation
The administrative guidelines acknowledge the reality that a large part of the transfer pricing documentation may not be available in one of the official languages of Belgium (i.e. Dutch, French or German). Reasons for this include the multinational character of business, the growing tendency of organising transfer pricing studies at a pan-European or global level, or the need to ask a foreign-related company for information.

Inspectors are urged to apply the flexibility they feel 'in conscience' to be necessary when they evaluate the reasons given by the taxpayer for submitting documentation in a foreign language. This applies particularly to pan-European or worldwide transfer pricing studies, group transfer pricing policies and contracts with foreign entities.

Code of conduct on transfer pricing
The administrative guidelines ratify the standardised and partly centralised approach to transfer pricing documentation that is recommended in the Code of Conduct. This also means that concepts such as the 'master-file' and 'country-specific documentation' are now officially introduced into a Belgian context. The resolution of the EU Council on this Code of Conduct is added to the administrative guidelines as an appendix.

Pan-European benchmarks
The administrative guidelines confirm the current practice whereby the use of pan-European data cannot per se be rejected in the context of a benchmark analysis.

The use of pan-European analyses finds its justification not only in the often-existing lack of sufficient points of reference on the Belgian market, but also in the fact that many multinational businesses prefer to spread the cost of investing in a benchmark analysis over various countries.

Treatment of tax havens
As of 1 January 2010, Belgian companies and Belgian permanent establishments of foreign companies are required to report in their annual tax returns all payments, direct and indirect, to tax havens totalling EUR 100,000 or more.

Within the context of this new provision, tax havens are considered to be:

- countries that have been identified by the OECD as not sufficiently cooperative in the domain of international exchange of information
- countries that appear on a list of countries with no or low (less than 10%) taxes.

Payments made, directly or indirectly, to such tax havens and which have not been reported accordingly are not accepted as deductible business expenses. The same applies for payments that have been appropriately reported, but for which the taxpayer concerned has not provided sufficient proof that the payments have been made in the context of real and sincere transactions with persons other than artificial constructions. The latter proof can be provided by all means of evidence as defined in the Belgian Income Tax Code.

Accounting guidelines
The Belgian Commission for Accounting Standards has caused some discussion in the accounting and tax field by issuing advice that deviates from current accounting practice. As Belgian tax law, in principle, follows accounting law (unless it explicitly deviates hereof), these evolutions may also impact the transfer pricing field. Broadly

speaking, the discussion relates to the acquisition of assets for free or below-market value.

Until now, Belgian accounting law basically referred to the historical cost to determine the acquisition value of assets, provided the principle of fair image of the balance sheet is not impaired.

If the acquisition price is below fair value, the accounting standard stipulates that the difference between fair value and historical cost is treated as an exceptional profit at the level of the acquiring company.

In 2009, a new Royal Decree introduced additional reporting requirements in statutory and consolidated accounts made under Belgian GAAP. The additional reporting requirements cover (1) information on non-arm's-length inter-company transactions and (2) information on the off-balance-sheet operations that could have an impact on the balance sheet. By ratifying this Royal Decree, the Belgian legislature complied with the content of the European Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006. These new accounting rules introduce a new burden of proof on the arm's-length character of inter-company transactions. More specifically, since the board of directors and the statutory auditor have to approve and sign these accounts, sufficient evidence should be available to draw conclusions on the arm's-length nature of inter-company transactions. Henceforth, for transactions covered by these new accounting rules, transfer pricing documentation may prove to be extremely useful or even required to comply with accounting law and to manage directors' liability.

Legal cases

Belgian authorities did not significantly turn their attention to transfer pricing until the beginning of the 1990s. Consequently, relatively few important transfer pricing cases have taken place in Belgium.

In 1995, the Supreme Court decided that the benefit of losses carried forward in a loss-making company is denied where there has been an abnormal transfer of profit from a profitable company to that loss-making entity (Supreme Court, 23 February 1995).

On 21 May 1997, the Liege Court of Appeal rendered a favourable decision recognising the acceptability of a set-off between advantages of transactions of related parties. In the case at hand, a Belgian distribution entity acquired the contractual rights (from a group affiliate) to distribute certain high-value branded products in the Benelux countries. However, this was subject to the Belgian entity contracting out the distribution of certain dutiable brands to a Swiss affiliate. The Belgian authorities stipulated that the Belgian-Swiss transaction granted abnormal or gratuitous benefits to the Swiss entity. However, it was demonstrated that the transfer of profit potential to a foreign-related-party subsequently generated an inbound transfer of profit from another foreign-related-party. The court based its decision on the economic reality in a group context, and the fact that different companies were involved (and thus an indirect set-off was made) did not jeopardise the possibility to net the advantages against each other. The Ghent Court of Appeal has also confirmed the acceptance of some form of economic solidarity in April 1999. In this case, the court ruled in favour of a Belgian company that had granted quality discounts to its UK affiliates to secure the going concern of the latter, as this was done for its own commercial interest (contra

Brussels Court of Appeal 12 April 2000). Also, the Ruling Commission (*see below*) confirms the view of the Belgian courts by granting rulings over the acceptability of certain benefits being granted between related entities because of particular intragroup reasons.

The Ghent Court of Appeal ruled in November 2002 in a high-profile tax case that an advantage received by a Belgian company pursuant to the acquisition of shares at book value, which was lower than market value, may create a Belgian tax liability on the basis of Article 24 of the ITC.

The Bergen Court of Appeal ruled in favour of analysing in detail why certain related party transactions take place under terms and conditions that might at first glance breach the arm's-length standard. In the case at hand, the Court accepted the granting of interest-free loans, as otherwise the group might have faced adverse financial circumstances.

Moreover, in the case of SGI vs. the Belgian State, the European Court of Justice (ECJ) delivered a judgment dated January 2010 that clarifies the position of transfer pricing rules within the framework of European law. The relevant provisions of the Belgian income tax law (Article 26) allow for adjustments in the cases of 'abnormal or gratuitous benefits' granted to a foreign affiliate, but not in a domestic context.

The ECJ found that (a) there was in principle a breach of the EU freedom of establishment, but (b) the Belgian legislation was justified as being within the public interest, provided (c) it was proportional.

Proportionality in this context means that (1) the expenses disallowed (or income imputed) are limited to the excess (shortfall) over the arm's-length amount; and (2) there is a defence of commercial justification.

The court remitted the case back to the Belgian courts to consider whether the way in which the national legislation was applied met the two tests of proportionality.

Furthermore, on 22 December 2010 the Constitutional Court of Belgium (*Arbitragehof/ Court d'Arbitrage*) published a preliminary ruling based on the request from the Ghent Court of Appeal of 5 October 2010 in the case of NV Vergo Technics v Belgian State (No. 5042), which confirmed that the current version of the corporate income tax code that may in some situations still trigger double taxation does not breach the equality principle laid down in the constitution

The 'substance over form' approach also has been addressed by a number of Belgian courts. For instance, on 27 October 2010 the Antwerp Court of First Instance confirmed the priority of the substance principle. In this case, the court reconfirmed the rejection of deduction of certain business expenses related to a seat of management for lack of justification of personnel, offices, central bookkeeping or archives of the company.

On 10 June 2010 the Court of Cassation as well issued a decision where it stressed the importance of substance. In its decision, the court confirmed that the management fees paid to a company having neither tangible and intangible assets nor operational expenses to perform such management services were deemed to be paid to another company, i.e. the effective provider of the management services.

In a number of cases, different courts have accepted that the conditional waiver of a debt by a parent company to one of its subsidiaries does not constitute an abnormal or gratuitous advantage (after proving and fulfilling all the conditions and requirements). Moreover, it is also worthwhile mentioning that Belgium changed its legislation in 2009 with respect to waiver of debts to protect enterprises in financial distress (*see section on Debt waivers*).

However, on 31 January 2012, the Ghent Court of Appeal decided that the waiver of a debt by a Belgian parent company to its Italian subsidiary – despite the fact that is definitely not abnormal for a parent company to financially support its subsidiary under favourable conditions is to be considered a gratuitous advantage as it was not demonstrated that the Italian subsidiary was confronted with imminent bankruptcy at the time of the waiver. As such, according to the Court the waiver of debt by the Belgian company was not required or necessary.

Burden of proof

In theory, taxpayers must demonstrate that business expenses qualify as deductible expenses in accordance with Article 49 of the ITC, while the tax authorities must demonstrate that profit transfers to an affiliate are 'abnormal or gratuitous benefits'. In practice, however, the tax authorities have actually requested on several occasions that taxpayers demonstrate that the transfer pricing methodology adopted is on an arm's-length basis (*see below*).

Since 1997, the tax authorities have scrutinised the deductibility of management service fees in a more stringent way. The taxpayer is required to demonstrate that any services provided are both necessary to the business of the recipient and charged at market value.

Tax audit procedures

As noted above, Belgian tax authorities have issued administrative guidelines on transfer pricing audits and documentation. Although these guidelines are not legally binding, they play a pivotal role in current (and future) transfer pricing audits.

Selection of companies for audit

The administrative guidelines published in November 2006 contain a list of cases where it may be advisable to check the transfer pricing practices (*see section on Administrative guidelines*).

Transfer pricing enquiries may also arise in the course of a 'routine' tax audit.

The audit procedure

During the course of an audit, the inspector would normally visit the company's premises. The 1999 administrative guidelines urge tax inspectors to interview as many people as possible, including staff with an operational responsibility, to get a fair idea of the functions, assets and risks involved.

The tax audit normally begins with a written request for information. The taxpayer must provide the data requested within (in principle) one month. However, the 2006 administrative guidelines preach flexibility as to this one-month period. Any documentary evidence considered relevant to the audit can be requested and reviewed by the authorities. As to the issue of obtaining information from foreign companies, the approach of the administrative guidelines seems to be more demanding than the OECD Guidelines. Indeed, the fact that a Belgian subsidiary argues that it did not receive any information from its foreign parent on its transfer pricing policy can be deemed to reflect a lack of cooperation.

The 2006 administrative guidelines stimulate companies to have a pre-audit meeting with the authorities to (1) discuss the transfer pricing policy carried out with the group, (2) discuss the level of transfer pricing documentation already available and (3) avoid having irrelevant questions raised which ask the taxpayer to prepare an unreasonable amount of documents. This focused approach should save a lot of time for the taxpayer as well as the tax authorities.

Revised assessments and the appeals procedure

Since assessment year 1999, new revised assessments and appeals procedures have been introduced. The main features can be summarised as follows:

Once the tax inspector has completed the analysis, any adjustment is proposed in a notification of amendment outlining the reasons for the proposed amendment. The company has 1Month to agree or to express disagreement. The tax inspector then makes an assessment for the amount of tax which he or she believes is due (taking into account any relevant comments of the company with which the inspector agrees). Thereafter the company has six months within which to lodge an appeal with the Regional Director of Taxes. The decision of the Regional Director of Taxes may be appealed and litigated. In a number of circumstances, the intervention of the courts can be sought prior to receiving the decision of the Regional Director of Taxes.

Additional tax and penalties

Tax increases in the range of 10% to 200% of the increased tax can be imposed.

In practice, discussion has arisen as to whether penalties or increases of tax can be levied in the context of abnormal or gratuitous benefits granted by a Belgian taxpayer. Although conflicting case law exists (e.g. Antwerp Court of Appeal, 17 January 1989), the Antwerp Court of Appeal ruled on 15 April 1993 that by its mere nature, abnormal and gratuitous benefits are always elements that are not spontaneously declared in the company's tax return and can therefore not give rise to an additional tax penalty.

It is unlikely that this reasoning can be upheld in cases where Article 185, Section 2 of the ITC is applicable.

Resources available to the tax authorities

Within the Central Tax Administration, several attempts have been made to improve the quality of transfer pricing audits and the search for comparable information. To this end, a specialist transfer pricing team (STPT) was established to ensure coherent application of the transfer pricing rules by the tax authorities, with a view to achieving consistency in the application of tax policies.

In short, the mission statement of the STPT is to:

- act as the central point of contact for all tax authorities facing transfer pricing matters

- maintain contacts with the private sector and governmental bodies in the area of transfer pricing
- formulate proposals and render advice with respect to transfer pricing
- take initiatives and collaborate in the area of learning and education, with a view to a better sharing of transfer pricing knowledge within the tax authorities, and
- take initiatives and collaborate with respect to publications that the tax authorities have to issue with respect to transfer pricing.

In addition to creating the STPT, in 2006, the Belgian tax authorities also installed an experienced special transfer pricing investigation squad (special TP team) with a twofold mission:

- Build up transfer pricing expertise to the benefit of all field tax inspectors and develop the appropriate procedure to conduct tax audits in this area according to the OECD Guidelines.
- Carry out transfer pricing audits of multinationals present in Belgium through a subsidiary or branch.

Use and availability of comparable information

Use

As indicated above, Belgium, in its capacity as an OECD member, has adopted the OECD Guidelines. Comparable information could, therefore, be used in defending a pricing policy in accordance with the terms of the OECD Guidelines.

On 22 July 2010, the OECD approved and published the final revision of Chapter I-III of the OECD Transfer Pricing Guidelines. One of the most significant changes in this respect is the removal of the hierarchy between traditional methods and profit-based methods in favour of the 'most appropriate method' rule. This means that in principle, all the authorised OECD methods now rank equally. In addition, higher standards of comparability are advocated. It is expected that the Belgian tax authorities will be using these new guidelines in evaluating taxpayers' transactions upon tax audits.

Availability

The search for comparables relies primarily upon databases that provide financial data on the major Belgian companies. These databases provide comprehensive annual financial data, historical information and information on business activities, all of which is largely extracted and compiled from statutory accounts.

In addition, the Belgian National Bank maintains a database that contains all statutory accounts. Entries are classified according to NACE industry code (i.e. by type of economic activity in which the company is engaged).

Information on comparable financial instruments (such as cash-pooling, factoring, etc.) can be obtained from banks. This information (e.g. market interest rates) can then be used to support or defend a transfer pricing policy.

The 1999 administrative guidelines acknowledge that Belgium is a small country, so sufficient comparable Belgian data may be difficult to obtain. Consequently, the use of foreign comparables is accepted, provided proper explanation can be provided as to the validity of using surrogate markets. The 2006 administrative guidelines reconfirm that pan-European data cannot per se be rejected in the context of a benchmark analysis.

Risk transactions or industries

Generally, there are no industry sectors which are more likely to be challenged than any other, and, since there are no excluded transactions, all transactions between related companies may be under scrutiny.

Furthermore, the authorities are more likely to question the price of services than the transfer of goods, and it is noticeable that some transactions are attracting increasing attention.

Debt waivers

According to Article 207 of the ITC, in some circumstances a Belgian company receiving abnormal or gratuitous benefits, whether directly or indirectly, is not allowed to offset amongst others current year losses or losses carried forward against these benefits. The circumstances in which this applies are those where the company receiving the benefits is directly or indirectly related to the company granting such benefits. This rule is being used stringently in cases where a loss-making company benefits from a debt waiver. In these circumstances, the waiver is treated as an abnormal or gratuitous benefit, although certain court cases (and also rulings) confirm the acceptability of intragroup debt waivers under particular circumstances.

In the beginning of 2009, however, the Belgian administration introduced a Continuity Act, which assists companies with judicial restructuring in a court of law. The act provides, among other things, a tax relief for a waiver of debt on both the creditor and debtor side. If a creditor waives debts according to the judicial restructuring procedure, the debtor's profit resulting from the debt reduction granted by the creditor should remain tax-exempt and the creditor's expenses resulting from waiving the debt will remain tax-deductible within Belgium. In this respect, the Act modified Section 48 of the ITC, which now explicitly states that, following approval by the court, expenses incurred due to a waiver of debt will qualify as tax-deductible. Similarly, (exceptional) profits are tax-exempt for the company receiving the waiver.

Permanent establishments – transactions with head office

The tax rules and administrative practices can be summarised as follows.

It is acceptable that, for tax purposes, a contractual relationship exists between a head office and its permanent establishment (PE). Hence, the arm's-length principle applies to most transactions between the head office and the PE, such as the sale of goods and the provision of services based on the separate entity approach. It is accepted that 'notional profits' can arise from internal transfers and that, in accordance with this treatment, these might be subject to taxation before any profit is actually realised by the enterprise as a whole.

Services

During a tax audit, particular attention would be paid to payments such as management fees or technical support fees to establish whether these payments should actually have taken the form of dividends.

Advance pricing agreements

Unilateral

As of 1 January 2003, the Belgian government introduced a new ruling practice that seeks to increase upfront legal certainty for investors, while taking into account national and international tax standards.

Under the new regime, a ruling is defined as an ‘upfront agreement’, which is a legal act by the Federal Public Service of Finance in conformity with the rules in force with respect to the application of law to a specific situation or operation that has not yet produced a tax effect.

Previously, a taxpayer could apply for a ruling only in a limited number of cases. Now, a taxpayer may apply for a ruling in all cases unless there is a specific exclusion. Although the Ministry of Finance acknowledges that it is impossible to provide a comprehensive list of all excluded topics, the new ruling practice nevertheless explicitly excludes some ruling categories to demonstrate the open nature of the new ruling system. To this end, a specific Royal Decree confirming the exclusions was published in January 2003.

A taxpayer may not apply for a ruling involving tax rates, computations, returns and audits; evidence, statutes of limitation and professional secrecy; matters governed by a specific approval procedure; issues requiring liaison between the Ministry of Finance and other authorities, whereby the former cannot rule unilaterally; matters governed by diplomatic rules; penalty provisions and tax increases; systems of notional taxation as for instance used in the agricultural sector; and tax exemptions.

In 2004, further changes to the ruling procedure were made to enhance a flexible cooperation between taxpayers and the Ruling Commission. At the same time, the ruling procedure itself has been rendered more efficient. These changes took effect 1 January 2005.

The provisions of double taxation treaties fall within the scope of the new ruling practice and, therefore, the Belgian competent authority is involved in the preparatory phase of making the ruling decision to ensure consistency of the decisions of the Ruling Commission in this respect.

Summaries of the rulings are published anonymously in the form of individual or collective summaries. The rulings are published at the government’s website, unless a foreign taxpayer is involved and the treaty partner has rules preventing publication. In such cases, approval to publish the ruling is requested.

Under the revised ruling practice, the use of pre-filing meetings is encouraged. A request for an advance ruling can be filed by (registered) mail, fax or email. The Ruling Commission must confirm receipt of a request within five working days. Subsequently, a meeting is organised allowing the Ruling Commission to raise questions and the applicant to support its request. Recent experiences have demonstrated the effectiveness of the Commission and its willingness to accommodate, within the borders of the national and international legal framework, the search by the taxpayer for upfront certainty. Although there is no legally binding term to issue a ruling, it is the Ruling Commission’s intention to issue its decision within three months (counting as of the submission of the formal ruling application). In most cases, this three-month period is adhered to.

Bilateral/Multilateral
Under the new ruling practice, taxpayers may be invited to open multilateral discussions with other competent authorities. These issues are dealt with case by case according to the relevant competent authority provision as stipulated in the tax treaty.

Recent experience shows that the Belgian tax authorities are also promoting bilateral or multilateral agreements and that they take a cooperative position for realising such agreements.

Competent authorities
On 27 November 2006 the US and Belgium signed a new income tax treaty and protocol to replace the 1970 income tax treaty. This new treaty and protocol entered into force on 28 December 2007. The new treaty introduces an innovative binding arbitration procedure in the context of the mutual agreement procedure. Indeed, when the competent authorities are unable to reach an agreement, the case shall be resolved through arbitration within six months from referral. In this type of arbitration, each of the tax authorities proposes only one figure for settlement, and the arbitrator must select one of the figures ('baseball arbitration').

Anticipated developments in law and practice
Practice has shown a significant increase in transfer pricing audits in Belgium. This trend is expected to continue.

Within that framework, the importance of having available upfront transfer pricing documentation will only increase.

In terms of new laws, it may be expected that the government might seek additional budgetary measures. The intended changes towards the NID regime are the most likely example of such measures.

Liaison with customs authorities
Although it is possible for an exchange of information to take place between the income tax and customs authorities, this rarely happens in practice.

Joint investigations
A facility exists for the Belgian tax authorities to exchange information with the tax authorities of another country. According to Belgian law, such an exchange must be organised through the Central Tax Administration. A number of bilateral treaties have been concluded to facilitate this process.

The 1999 administrative guidelines also consider the possibility of conducting joint investigations with foreign tax authorities.

Belgium is currently involved in several of these multilateral audits.

Thin capitalisation
The arm's-length principle applies to financing arrangements between affiliated parties. Article 55 of the ITC provides that interest paid is a tax-deductible business expense, provided that the rate of interest does not exceed normal rates, taking into account the specific risks of the operation (e.g. the financial status of the debtor and the duration of the loan).

B

In addition, note that related party loans from shareholders or directors of a Belgian borrowing company are subject to specific restrictions.

In the past, Belgian tax law did not have a general thin-cap rule. A special thin-cap rule only existed for interest payments or attributions to (real) beneficiaries taxed at low rates on that interest. This was the so-called 7/1 debt-equity ratio.

The Programme Acts of 20 March and 22 June 2012 replace the 7/1 rule with a new rule introducing a (general) 5/1 debt-equity ratio. For the purposes of the thin-cap rule, equity is defined as the sum of the taxed reserves at the beginning of the taxable period and the paid-up capital at the end of the taxable period. For the purposes of this new rule, certain non-taxed reserves are deemed to be taxed reserves. It regards *inter alia* certain tax-free reserves created upon a merger/division (including as a result of merger goodwill).

For the purposes of the thin-cap rule, debt is defined as:

- all loans, whereby the beneficial owner is not subject to income taxes, or, with regard to the interest income, is subject to a tax regime that is substantially more advantageous than the Belgian tax regime, and
- all intra-group loans (whereby 'group' should be interpreted in accordance with section 11 of the Companies Code).

Bonds and other publicly issued securities are excluded, as are loans granted by financial institutions. The new thin-cap rule is not applicable to loans contracted by (movable) leasing companies (as defined by section 2 of Royal Decree no. 55 of 10 November 1967), to companies whose main activity consists of factoring or immovable leasing within the financial sector and to the extent the funds are effectively used for leasing and factoring activities and to loans contracted by companies primarily active in the field of public-private cooperation.

An anti-abuse rule was introduced stating that, if the loans are guaranteed by a third party or if loans are funded by a third party that partly or wholly bears the risk related to them, the third party is deemed to be the beneficial owner of the interest, if the guarantee or the funding has tax avoidance as its main purpose. Third party in this context would also mean group companies, even if the loan has formally been granted by a non-group member.

The new Programme Act of 22 June 2012 has made some amendments to the thin cap rule in order to safeguard companies that have a centralised treasury function in Belgium. The amendments introduce netting for thin-cap purposes for companies responsible for the centralised treasury management of the group. These companies are allowed to net all interest paid to group companies with all interest received from group companies insofar the interest is paid/received within the context of a framework agreement for centralised treasury management. In case where the 5/1 debt-equity ratio has been exceeded, only net interest payments (of the higher amount) will be regarded as non tax-deductible business expenses. Centralised treasury management is defined as management of daily treasury transactions or treasury management on a short-term basis (e.g. cash pools) or, exceptionally, longer-term treasury management. In addition, in order to qualify for the exemption, the treasury company should set up a framework agreement under which the group companies clarify the treasury activities and the financing model applicable to their group.