Tax Treatment of Hybrids - Belgium

IFA Joint Meeting - Nice

Charles-Albert Helleputte
Partner

3 June 2016

Past Belgian IFA work on Hybrids

- In recent years, at least two Belgian contributions to IFA work in the area:
  - COLMANT B. and Jeanmart F-X, Belgian report on Tax Treatment of hybrid financial instruments in cross-border transactions (Munich Congress, IFA, 2000)
  - VANOPPEN S., Belgian report on The debt-equity conundrum (Boston Congress, IFA 2012)

Past Belgian IFA work on Hybrids

- In recent years, at least two Belgian contributions to IFA work in the area:
  - COLMANT B. and Jeanmart F-X, Belgian report on Tax Treatment of hybrid financial instruments in cross-border transactions (Munich Congress, IFA, 2000):
    - Report focussed on legal, accounting and tax treatment of selected set of hybrid instruments (convertible bonds, reverse convertible, ORA and immovable certificates) when used by taxpayers (other than credit institutions)
    - Abuse (if any) combatted by the sham doctrine, GAAR or specific anti-abuse provisions
    - Refers to the concept of financial instruments, hybrid from a tax point of view

Past Belgian IFA work on Hybrids

- In recent years, at least two Belgian contributions to IFA work in the area:
  - COLMANT B. and Jeanmart F-X, Belgian report on Tax Treatment of hybrid financial instruments in cross-border transactions (Munich Congress, IFA, 2000):
    - In a cross-border context:

      "La primauté du droit conventionnel sur le droit belge et l'obligation d'interpréter les conventions conformément à l'intention conjointe des parties peuvent conduire à penser que le fisc belge ne pourra procéder à de tells requalifications sur base de son seul droit interne

      Il n'en irait autrement que si l'application de legislations ou de theories preventives de l'évitement de l'impôt pouvait trouver en l'espèce son fondement en droit international"

Past Belgian IFA work on Hybrids

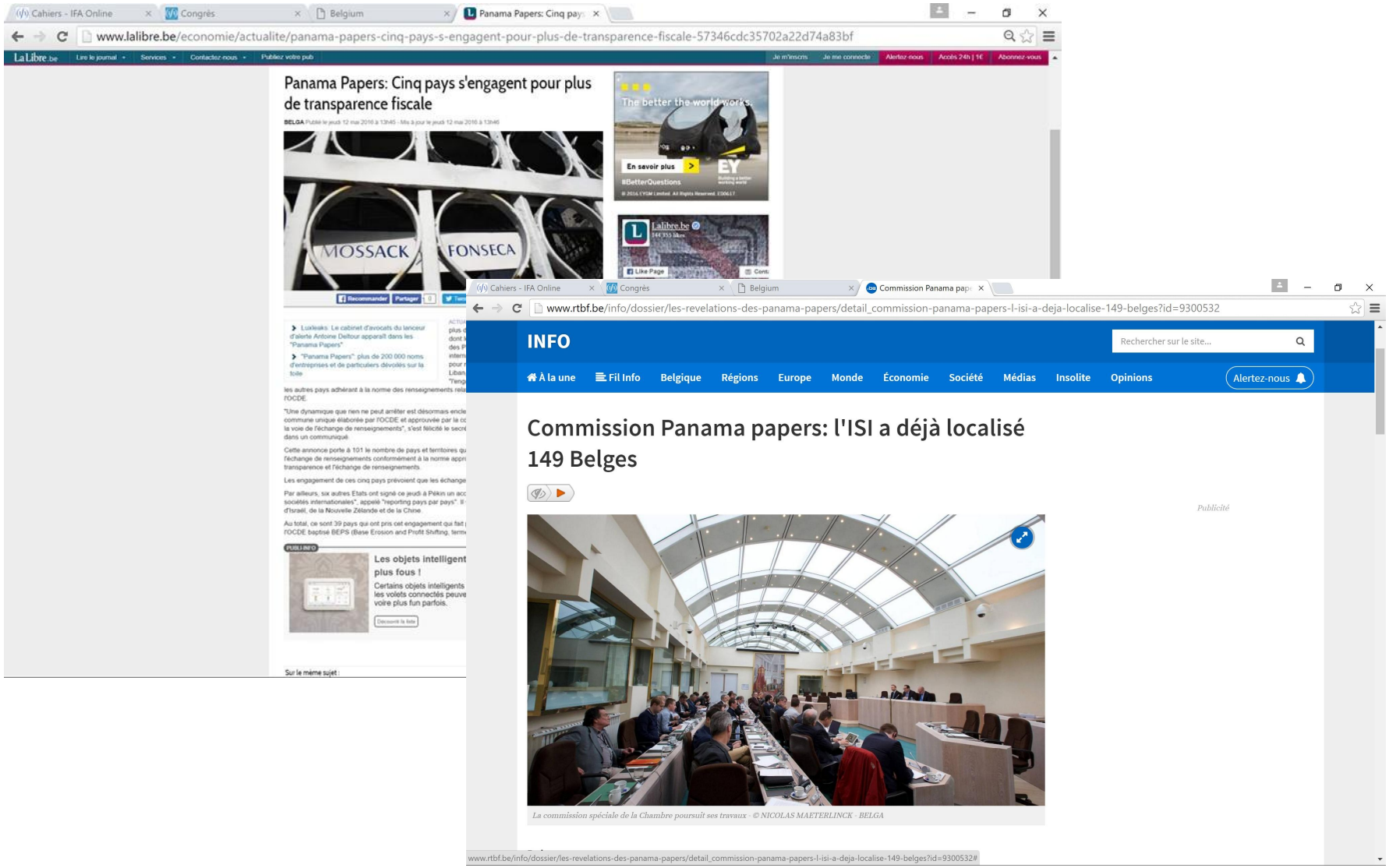
- In recent years, at least two Belgian contributions to IFA work in the area:
  - VANOPPEN S., Belgian report on The debt-equity conundrum (Boston Congress, IFA 2012) – focus on treatment of PPLs:
    - "The Belgian ruling Commission has confirmed that the hybrid financing instruments brought before the Commission were not open to reclassification based on Art. 344, para. 1"
    - "In relation to payments on cross-border hybrid financing instruments that give rise to double tax benefits [...] further scrutiny by the European Commission has also been announced in the context of the Code of Conduct (on harmful tax competition)"

BEPS Action N0. 2

- Action No. 2 = Neutralizing the effects of hybrid mismatch arrangements

Mismatch	Arrangement	Specific recommendation	Recommended Hybrid mismatch rule		
			Response	Defensive rule	Scope
Deduction / No inclusion	Hybrid Financial Instrument	No dividend exemption / proportionate limitation of WHT credits	Deny payer deduction	Include as ordinary income	Related parties and structured arrangements
Indirect Deduction / No inclusion	Imported mismatch arrangements	-	Deny payer deduction	-	Member of controlled group and structured arrangements

The Panama Papers



The Panama Papers

- 12 April 2016: Finance Minister discussed the Panama papers and announced eight new measures:
  - Faster treatment of tax fraud cases
  - Increase in the audits and assessment period to 24 months when information are provided from abroad
  - Conclusion of a TIEA with Panama
  - Changes to tax collection rules
  - Simplified notification procedures (no use of bailiff)
  - Access to digital data
  - Increase administrative fine for unreported legal arrangements
  - Propose policy options for tax constructions

Current Status of the ATA Directive

- Proposal published on 28 January 2016
- Last discussed during the May ECOFIN meeting
- Minimum standards for Member States
- Two relevant provisions in the ATA Directive:
  - Article 7: GAAR – good level of consensus among Member States. No big impact for Belgium, considering existing Art. 344, § 1 of the Belgian Income Tax Code
  - Article 10: framework against hybrid mismatch in EU situations (although some Member States have required to deal with third-country situations as well – new proposal to be tabled for end 2016). Significant impact for Belgium - new legislation to be prepared to deal with this situation (by 2019)

Last changes in the PSD Directive in Belgium law

- Changes to Art. 1 (2) of the PSD Directive
  - Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.
  - An arrangement may comprise more than one step or part.
  - For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
  - This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.'
  - Target implementation date: 1 January 2016

Last changes in the PSD Directive in Belgium law

- Changes to Art. 1 (2) of the PSD Directive = changes to Belgian law ?
  - Not “yet”
  - Belgium has a long history of complicated relationships with the PSD
  - Will the implementation be provided in the BEPS-package anticipated for June or should 344, § 1 also be considered as fit for the purpose?

Last changes in the PSD Directive in Belgium law

- 27 May: Belgian Council of Ministers approves draft bill on various fiscal measures:
  - measures to transpose the amendments to the Parent-Subsidiary Directive (90/435), including the introduction of anti-avoidance measures for dividends and the introduction of a general anti-abuse provision;
  - provisions to clarify the application of the speculative tax on options and other financial instruments;
  - an amendment of article 269/1 following the decision in Tate & Lyle Investments (Case C-384/11);
  - repeal of the current patent box deduction; and
  - the introduction of an option to pay the exit taxes at once or in instalments

Article 344, § 1 Belgian Income Tax Code

- “New” general anti-abuse provision was introduced in Belgian tax law applicable as of tax year 2013 – income year 2012. 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: (i) 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 (ii) 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

Article 344, § 1 Belgian Income Tax Code

- 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

Practical consequences

- Existing Art. 344, § 1 deals with many situations domestically
- The “COLMANT prophesy” might be on its way, as international Law (and EU one) are/will increasingly provide for some grounds). This might give some tools to the tax authorities
- Belgium “will have” to adapt to adequately tackle mismatch

Thanks for your attention

16