Belgium

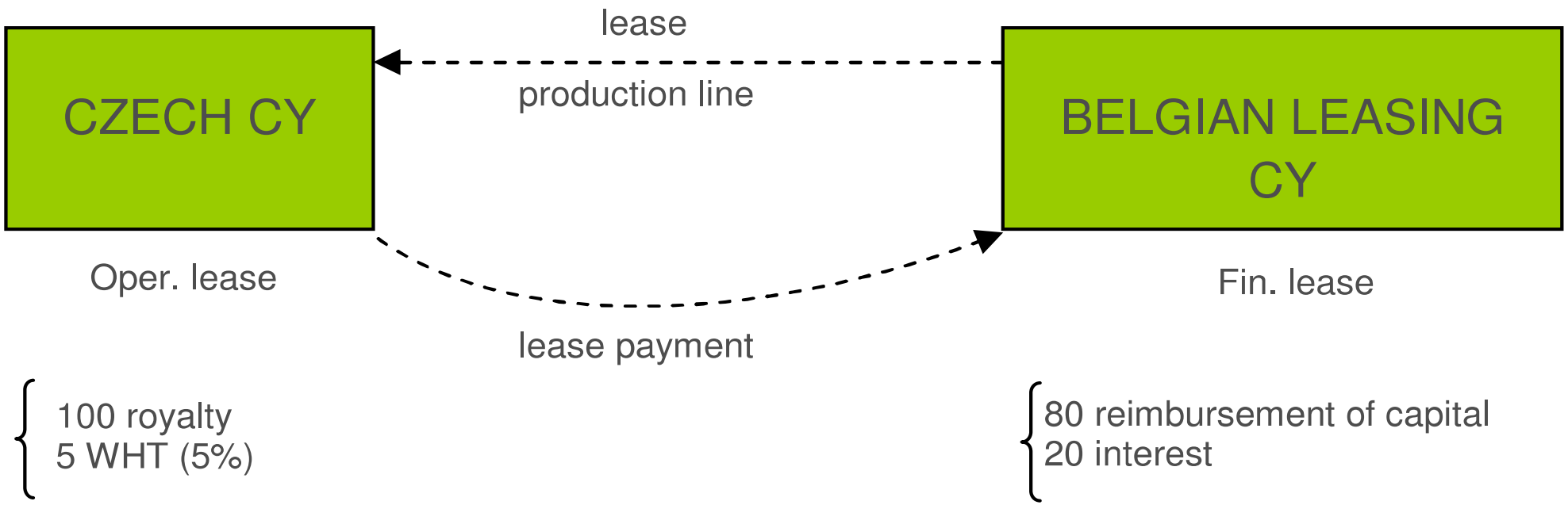
Supreme Court, January 22, 2010

Characterization of income for the application of the foreign tax credit

Bernard Peeters

Deputy Judge Court of Appeal Antwerp

Belgium : Supreme Court, January 22, 2010



Belgium : Supreme Court, January 22,2010

- **DTT Belgium-Czech Republic June 19, 1975**
- Art. 12.3.(b) of the treaty defines "the term 'royalties', as used in this Article" as: *"payments of any kind received as a consideration for the use of, or the right to use, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment not being immovable property mentioned in Article 6, and for information concerning industrial, commercial or scientific experience."*
- Art. 12.2 of the treaty allows the Czech Republic to tax the lease payments under the following conditions: *"Notwithstanding the provisions of paragraph 1, the royalties mentioned in paragraph 3 at (b) may also be taxed in the Contracting State from which they are derived and according to the law of that State, but if the recipient of the royalties is the beneficial owner thereof, then the tax so charged shall not exceed 5 percent of the gross amount of the royalties."*

Belgium : Supreme Court, January 22, 2010

- **DTT Belgium-Czech Republic June 19, 1975**
- As far as the Belgium-Czech Republic treaty is concerned, Belgium had to grant relief from double taxation according to Art. 23.A.(b) of the treaty reading as follows:
- *"As regards [...] any royalties subject to tax in accordance with paragraph 2 or 6 of Article 12,* ***a lump sum foreign tax credit****,* ***provided for by Belgian law****, shall be granted with respect to Belgian tax relating to such income****, under the conditions and at the rates provided for in that law.****"*

Belgium : Supreme Court : January 22, 2010

- The Supreme Court decided in favour of the tax authorities.
- According to the Supreme Court, the definition of 'royalties' incorporated in Art. 12.3.(b) only determines the field of application of this article. When it comes to Art. 23.A.(b) of the treaty, it held that the domestic classification should be decisive. The Court based its decision – i.e. that the definition of royalties in Art. 12.3.(b) only determines the scope of *that* provision - on the wording of Art. 23.A.(b) which refers to "*a fixed foreign tax credit, provided for by Belgian law, under the* ***conditions and at the rates*** *provided for in that law*".
- According to the Supreme Court, this reference to domestic law includes the characterization of the income, the determination of the **taxable base and the calculation** of the amount of the FTC. Consequently, the Supreme Court decided that the domestic classification should be followed for the calculation of the FTC. As a result, the FTC was granted only for the interest part of the lease payments, and not for the total amount of the lease payments.