Dutch Holding-, Finance- and Royalty Companies 2017

(An introduction to the main Dutch tax matters)
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Introduction

This brochure is an introduction to the main tax matters regarding Dutch Holding-, Finance-, and Royalty-companies.

The Netherlands is fiscally attractive to establish an intermediary holding-, finance- or royalty company because of the tax system which was implemented to support Dutch Multinational Enterprises (MNE’s) with subsidiaries worldwide. This tax system can – under conditions – also be attractive for foreign MNE’s.

The main features:
- the participation exemption (100% corporate tax exemption for dividends and capital gains from qualifying participations);
- absence of capital tax;
- absence of interest- and royalty-withholding tax;
- absence of dividend withholding tax upon profit distributions by Dutch COOP holding company to its foreign members in active [non-abusive] investment structures;
- absence of dividend withholding tax upon distribution of participation dividends in case of 5% or more shareholding or membership in tax treaty state or EU in active [non-abusive] structures as of 2018;
- extensive tax treaty network of some 100 tax treaties with relatively low (inbound/outbound) dividend- and (inbound) interest/royalty-withholding tax rates;
- special tax treaties with Curacao, Saint Martin, Aruba and the Dutch public entity Caribbean Netherlands (Bonaire, Saba, Statia);
- broad implementation of EU Parent-Subsidiary Directive and EU Interest- and Royalty Directive;
- advance tax ruling (ATR) and advance pricing agreement (APA) policy with a thorough assessment based on comprehensive information required from the taxpayer;
- extensive investment protection treaty network of some 100 bilateral investment treaties for protection against nationalization of investments and discriminatory treatment (incl. taxation) in politically challenging jurisdictions;
- some 50+ air transport treaties / agreements to avoid double taxation on international air transport profits if no tax treaty is available with similar arrangements;
- some 20+ social security treaties e.g. with US, Japan and application of the EU social security Decree;
- 30% wage tax ruling for expats recruited from abroad including job-rotation within MNE;
- Reverse charge rule regarding import VAT (Netherlands: VAT gateway to Europe);
- flexible corporate law system (even more flexible system for BV companies since October 1, 2012); political and economic stability;
- good infrastructure and public transport, distribution facilities via Port of Rotterdam (largest sea port in Europe) and Amsterdam Schiphol Airport (4th in Europe), highly skilled international orientated labour force: some 20% of the Dutch working population works direct or indirect for foreign MNE’s with presence in the Netherlands.

Although this brochure covers a number of relevant areas, this brochure is not exhaustive. We strongly recommend that anyone intending to make use of the facilities referred to in this brochure seeks professional advice before undertaking any action. There are often complex financial and legal implications as well which need to be considered in consultation with a professional advisor.

Horlings Nexia offers a full range of audit and tax services. A staff of specialists is available to assist with most aspects of establishing tax efficient structures in The Netherlands and Dutch Caribbean.
1.1 General tax issues in The Netherlands

The main tax reasons for establishing a holding-, finance- or royalty company in The Netherlands are:

- participation exemption: 100% corporate tax exemption for dividends and capital gains from qualifying participations;
- absence of capital tax;
- extensive network of some 100 tax treaties;
- absence of domestic withholding tax on royalty and interest payments (outbound);
- relatively low withholding tax rates on royalty and interest receivables (inbound) from tax treaty countries;
- relatively low dividend withholding tax rates on (outbound) dividend payments to or (inbound) dividend received from tax treaty countries;
- broad implementation of EU Parent-Subsidiary Directive and EU Interest- and Royalty Directive;
- domestic dividend tax rate of 15%);
- 30% wage tax ruling for expats hired from abroad incl. job-rotation within MNE;
- Reverse charge rule regarding import VAT (Netherlands: VAT gateway to Europe);
- ATR and APA practice.

A. Dutch Corporate income tax (CIT)

A profit-generating corporation (domestic or foreign with Dutch permanent establishment doing business in the Netherlands) pays corporate income tax. Corporate income tax is levied on the taxable profits made by a company in a given year less deductible losses. Corporate income tax is levied at a 2016 rate of 20% on the first € 200,000 (first bracket will be raised 2018 up to 2021: € 250,000 - € 350,000) and at 25% on the excess. Profits must be determined on the principles of sound business practice and in a consistent manner. Transfer of the legal seat normally triggers ‘exit’ CIT on hidden profit reserves etc., however in EU situations there are exit tax provisions available. A company is required to file an annual CIT return with the tax administration within 5 months after the end of its financial year. Additional extension can be possible for another 9 months. Administrative penalties are due when no or an incorrect or incomplete return is filed.

Dutch group regime (tax treatment of fiscal unity)

Under certain conditions (legal and economic ownership of at least 95% of the shares of a Dutch subsidiary) a parent company may be taxed as a single tax entity together with one or more of its subsidiaries. For corporate income tax purposes this means that the subsidiaries are deemed to have been absorbed by the parent company. The main advantages of group taxation are that the losses of one company can be set off against profits from another group company, and that fixed assets may in principle be transferred tax-free from one company to another. A CIT group is also possible between a Dutch parent company and a Caribbean Netherlands subsidiary which falls – as a main rule - under the scope of Dutch CIT. For tax treaty purposes the place of residence of each of the group companies must be determined separately. Based on EU case law a fiscal unity is also allowed under conditions between Dutch group companies and PE’s despite (non-resident) EU intermediary- or EU parent Co. According to recent Dutch case law this should also be possible for Dutch sister companies with a non-EU non-resident parent Co. by invoking the non-discrimination clause in the relevant tax treaty.

When are (interest)costs deductible?

In principle, when determining profits all the business expenses are deductible. However, the deductibility of certain business expenses, especially interest, is subject to restrictions.

The interest paid on intercompany loans is sometimes not or only partly tax deductible. There are several restrictions however thin capitalization rules do no longer apply in the Netherlands. The thin cap rules have been replaced by the participation interest (in Dutch: ‘deelnemingsrente’) rules (see below proposal A1 under ‘base erosion provisions’).
When expenses exceed sound business amounts due to the intervention of shareholders and/or for the benefit of shareholders, the excess will be considered as a non-deductible distribution of profits (dividend). Likewise, when transactions with related parties are not carried out at arm’s length conditions, income may be imputed to one party and a corresponding notional deduction (informal capital) may be available with the other party. Even the entire loan can be qualified as non-businesslike and/or qualify as equity for tax purposes.

**Base Erosion Provisions**

The Dutch provisions deny the deduction of interest expense incurred on loans from related parties to the extent that the loans have been used for specific tax driven transactions (for example, the acquisition of shares in a related company or the acquisition of shares in a third party that subsequently is included in a fiscal unity: BV1-BV2 structures). Related means a shareholding of 33,33% or more. As of 2017 the definition of ”related party” is expanded to a “collaborative group”. Normally when the group borrows from third parties, the escape of ”business reason” exception can be invoked. According to recent case law a re-routing of intra-group loans outside the Netherlands also has to be based on sound business motives to be able to claim interest deduction.

Furthermore, interest expenses regarding dividend and capital repayments declared but unpaid, or paid however financed by an intercompany loan, may not be tax deductible.

Since 2007 the “sound business reason” and “reasonable rate of taxation” exceptions can apply to all these intercompany transactions. According to these rules a rate of taxation is reasonable if the (foreign) related creditor is subject to an effective rate of at least 10% in accordance with Dutch taxation standards. The tax inspector however can try to proof that the motives for creating the intercompany-loan or the conditions of the loan itself are not largely sound business.

New interest deduction restrictions with respect to interest paid to third parties recently have been introduced: (A1) a deduction restriction for interest on loans to finance the acquisition of participations, in case of excess of investments in subsidiaries over the equity of the parent Co; and (A2) a provision on the non-deductibility of excessive interest payments in case of company take-over followed by the creation of a fiscal unity (BV1-BV2). Interest paid by BV1 in relation to the acquisition is only tax deductible if the buying company BV1 has enough taxable profits of it’s own. Exceptions: [a] threshold for interest expenses below € 1,000,000 [b] takeover debt: takeover price ratio max. 3:2, in other words minimum of 40% equity payment on takeover price.

In 2012 the new interest deduction restriction (A2) was introduced. In order to provide more certainty for companies, excessive debt financing will not be determined by the debt-equity ratio after the takeover, but by means of the takeover price and the takeover debt. No excessive debt financing exists if the takeover debt in the year of takeover is not more than 60% of the takeover price. This percentage will, thereafter, be reduced by 5% per year to ultimately 25%. In the Tax Plan 2017 specific abusive “debt-push down-” and “fiscal unity-” transactions are combatted.

A restriction on interest deduction for loans taken to finance the acquisition of participations in case the investment in the subsidiary exceeds the equity of the parent company was introduced as of 2013 (see A1 above). This rule aims to prevent erosion of the Dutch tax base that occurs through excessive debt financing of (foreign) participations. The excessive part of the interest is not tax deductible. The excessive portion of the interest is defined as the part of the interest expenses proportional to the ratio: participation debts / total debts. Participation debts is defined as the amount by which the purchase price of the participations exceeds the parent company’s equity. The restriction only applies to the interest expenses in excess of € 750,000. Loans used to finance expansions of operational activities of subsidiaries and active group financing activities fall outside the scope of this restriction. Furthermore 90% of the purchase price of participations from book years started before or on January 1, 2006, can be ignored in normal situations.
The Netherlands did not intend to unilaterally implement an earnings stripping measure such as mentioned in OECD BEPS action point 4 (limiting base erosion): interest deduction limited to 10 – 30% of EBITDA (earnings before interest, taxes, depreciation and amortization) with a ‘group escape’. Interest deduction is not restricted if the ratio does not exceed the group net third party interest/EBITDA ratio or the level of equity is not worse than the group equity/liabilities ratio. However EU Anti Tax Avoidance Directive (ATAD 2016) mentions an interest limitation rule of 30% of EBITDA with a safe harbour threshold of € 3 mio borrowing costs as of 2019.

**Innovation box / Wage tax reduction (WBSO)**

Under the innovation box, income derived from a self-developed patented intangible asset developed are subject to an effective tax rate of 5% (5/25 x 25% corporate income tax) if the patent contributes at least 30% to the profit derived from the use of the intangible asset. The 5% rate also applies to intangible assets for which no patent is granted but which result from R&D activities for which an R&D certificate was received. Costs related to the self development of intellectual property (IP) do not have to be capitalized, but instead can immediately be deducted against taxable income. The profits will be taxed in the innovation box after the profits have exceeded the development costs of the (patented) intangible asset. Since 2011 pre-patent profits can also be included in this ‘recovery’ calculation. Withholding taxes on royalties can be credited against the Dutch CIT, subject to the normal limitations. The regime does not apply to brand names, company logos, and so on; its primary focus is research and development activities. However software R&D can qualify.

As of 2013, there is a rule for self developed IP used in own products or services of smaller companies: a fixed amount of 25% of the profits (max. € 25,000) is deemed to be profit from that intellectual property qualifying for the 5% regime. Maximum advantage is no more than € 5,000 corporate tax ((25%-/-5%) x € 25,000). There is no threshold.

Based on OECD BEPS Action Plan the modified nexus approach is introduced. This means that contracting out of R&D to group companies can not qualify anymore. This substance approach is laid down in a formula to calculate the qualifying IP box income. Furthermore the scope of the Dutch IP box is limited to a qualifying "entry ticket", i.e. a patent, utility model, (plant) breeder’s rights, orphan drug and supplementary protection certificate, software or other asset that is not common and/or a novelty item, developed in the Netherlands. The last mentioned innovative intangible assets can only qualify – via WBSO / R&D certificate - for smaller companies (group turnover max. 250 mio over 5 years – EUR 50 mio per year - and IP turnover max. 37,5 mio over 5 years; EUR 7,5 mio per year).

The new Innovation box regime 2016 is approved by ECOFIN Code of Conduct Group which concluded that the new regime does not constitute harmful tax competition.

Transitional rules apply to intangible assets that have been developed by 30 June 2016 and before 1 January 2017, for which no R&D statement was issued. All IP box rulings generally end because of the new legislation, however IP box rulings of smaller companies could continue under the transitional rules.

Furthermore there is a wage tax reduction (WBSO) for salaries of certified R&D employees. As of 2016 RDA and WBSO are amalgamated in WBSO only. Up to € 350,000 of qualifying R&D expenditure results in a reduction of 32% (40% for start ups) and 16% wage tax reduction on any excess.

Finally new tax incentives as of 2017 for innovative starters with a R&D certificate: (i) minimum wage is acceptable in stead of minimum annual usual wage of EUR 45,000 and (ii) 75% valuation for wage tax purposes of share option rights.

**Set off of losses**

A company may set off its losses against its taxable profits for one preceding year (carry back) and against its taxable profits for nine future years (carry forward).
The losses incurred by an investment institution or a company reducing operations may only be set off against future annual profits if at least 70% of its shares continue to be held by the same shareholders (to avoid trade in loss compensation companies).

Losses of a holding company or group financing company may only be set off against future annual profits if at least 70% of its shares continue to be held by the same shareholders (to avoid trade in loss compensation companies).

Liquidation losses regarding a liquidated subsidiary are under certain conditions also deductible.

Finally deductibility of foreign permanent establishment (PE) losses is no longer possible since 2012. Instead a full exemption of results [positive/negative] of foreign branch profits has been introduced (there is an exception, which means that these losses come deducted, as final liquidation losses of foreign PE / branches and/or currency losses in case of conversion in foreign currency of an investment in a foreign permanent establishment).

**Functional currency**

Dutch corporate tax payers may adopt a currency which differs from the €uro as their functional currency. Upon request the Dutch tax payer may not only account in the functional currency but also file its annual corporate income tax return in the same currency. One has to apply for this regime.

**B. International Tax planning**

In international tax planning The Netherlands is attractive because of the extensive tax treaty network (see Appendix I) and the participation exemption (see chapter 2.1). In this paragraph we will describe in short four Dutch tax planning tools.

1. **Dutch COOP (see also par. 2.1.1. with new rules 2018 similar to Dutch BV's)**

The Dutch co-operative investment fund (with or without a Dutch BV as subsidiary) can be very useful as a Dutch holding company in "active" investment structures because the Dutch COOP often is not taxable for Dutch dividend withholding tax purposes and can benefit from the Dutch participation exemption and exemption of foreign PE's. COOP arrangements that are not genuine ('objective' artificial structure test) and are only made to obtain the (dividend) tax benefits ('subjective' main purpose test), are generally taxable for Dutch dividend withholding tax purposes. COOP structures will not be regarded as artificial if there are sound business reasons to structure in this way. Beneficial structures will still be (1) where the Dutch COOP runs an active business with employees (2) the member of the Dutch COOP runs an active business and the membership right is part of the business assets (3) Dutch COOP with interrelated active member (parent) company, if member has substance in accordance with Dutch standards (see Annex II). An advance Tax Ruling can be applied for at the tax authorities.

2. **(Dutch) permanent establishment (PE)**

To start up business in Europe a Dutch PE or branch office can be tax advantageous. Profits are taxed with CIT, however profit distributions are generally not taxed with Dutch dividend withholding tax. Even the participation exemption can be applicable when the shares held are assets of the Dutch PE. When start-up losses have been settled, the branch office can be transferred tax free by business merger into a new Dutch subsidiary.

In case of a transparent entity all business partners have to be registered for (corporate) income tax purposes. This can be tax advantageous for foreign income tax partners because low first income tax bracket.

Furthermore a foreign PE can be beneficial to avoid (dividend) withholding taxes in the PE state.

Based on OECD BEPS action Plan, artificial avoidance of PE status will be prevented. Changes in article 5 (PE article) of Dutch tax treaties will be negotiated on a bilateral basis or implemented multilaterally. According to the EU ATAD 'exit taxation' rules will apply ultimately as of 2019.

3. **Participating / Hybrid loans (will not work anymore as of 2016)**

Based on changes in the EU Parent-Subsidiary Directive this will not work anymore for hybrid loan structures as of 2016 (exclusion of participation exemption for Dutch parent/creditor if interest deduction is available at the level of the foreign subsidiary/debtor).
4. The 30% wage tax ruling for expats hired from abroad incl. job-rotation within MNE

Foreign employees, recruited from abroad (more than 150 km from the Dutch border), who come to work in the Netherlands temporarily can qualify for the 30% ruling under certain (scarcity / expertise) conditions. The ruling entails that the employer is entitled to pay the expat a tax-free remuneration of 30% to cover the extra costs of their stay in the Netherlands (extraterritorial costs). The disposition is only valid for a maximum period of 8 years. As a (partial) non-resident tax payer, wealth tax (income tax box 3 except for Dutch real estate) will generally not be applicable. The compensation amounts to 30% of the gross salary, including the compensation, of minimum EUR 52,857 or 30/70 of the salary excluding the compensation of minimum EUR 37,000.

C. Absence of Dutch capital tax

(Informal) capital contributions made to a Dutch company are not subject to Dutch capital tax.

D. Dividend withholding tax

As of 2007 the domestic dividend withholding tax rate in The Netherlands has been lowered from 25% to 15%. A percentage of 5% or more in a Dutch subsidiary qualifies for an exemption of Dutch dividend withholding tax upon distribution of dividends to NL or EU parent companies (2018: extension to tax treaty situations). Similar rules apply to a Swiss, Iceland and Norwegian parent Co. For parent companies outside the EU 15% Dutch dividend withholding tax has to be withheld, unless the relevant tax treaty prescribes a lower %.

If applicable 'Form IB 92' or 'IB 93 Universeel' must be filed to obtain an exemption or refund of Dutch dividend withholding tax on portfolio dividends. No forms but only a request has to be filed regarding exemption or refund of Dutch dividend withholding tax on dividends paid to substantial shareholders of 25% or more. However for substantial shareholders from Luxemburg and Singapore special forms are applicable. Requests for refunds must be filed within 3-5 years following the year of dividend payment. For US shareholders other specific regulations apply. Also EU resident tax exempt entities can apply for a refund of Dutch dividend WHT withheld.

E. Value Added Tax (VAT)

Every taxable entrepreneur must pay turnover tax on turnover regarding deliveries made and/or services rendered. Turnover tax is also known as VAT (value added tax). In the Netherlands normally 21% VAT is levied. Passive holding activities do not qualify as VAT taxable activities however management board- and supervisory board-activities do qualify. Active holdings therefore reclaim input VAT regarding their economic activities. Intellectual services, such as consultancy services, rendered to foreign companies are not taxed with VAT in The Netherlands because of the reverse charge rule (place of B2B service abroad).

Finance activities do not qualify for VAT purposes either (exempt), VAT paid regarding these activities can therefore not be reclaimed, unless the activities are carried out with a contracting party outside the European Union (article 15(2) VAT Act 1968).

License activities do qualify for VAT purposes. Generally the reverse charge rule is applicable to the services of transferring and rendering of patent rights and licences and similar rights.

Transactions between branch office and foreign head office are generally not taxable for VAT purposes.

As of 2010 the use of the reverse charge rule is expanded and applies to all business to business (B2B) services rendered to foreign clients (there are exceptions, for instance services regarding real estate). These reversed B2B services also have to be mentioned in a monthly (> €50,000 per quarter), quarterly or yearly listing return.

Foreign VAT refund claims as of 2009 can be filed digitally by EU VAT entrepreneurs in their country of residence.

The Netherlands: the VAT Gateway to Europe

Import of goods into the EU is VAT taxable at customs. If the imported goods are sold subsequently, the import VAT is generally deductible in the VAT return of the VAT entrepreneur. However, payment at customs can result in a cash-flow disadvantage. Therefore the Netherlands allows the reverse charge rule regarding import VAT when a so called article 23 VAT Act license has been obtained. If a non-resident company wants to benefit from an article 23 license, with settlement of import VAT in the VAT return (in stead of payment at customs and reclaim in VAT return), it can appoint a Dutch VAT representative for this purpose.
2. Holding, Finance and Royalty companies

Tax ruling policy in the Netherlands

The Netherlands has an ‘Advance Pricing Agreement’ (APA) and an ‘Advance Tax Ruling’ (ATR) practice as of March 1, 2001. The former ‘model’ ruling practice for intermediary companies was abandoned. There was a grandfathering rule until 2005. As of 2006 only the arm’s length case by case APA/ATR practice is applicable.

The new ruling policy for intra-group finance and licensing companies is based on the OECD transfer pricing guidelines as laid down in article 8b and article 8c of the Dutch CIT Act.

An Advance Pricing Agreement gives advance certainty on the fiscal acceptability of the price (arm’s length transfer pricing) that the Dutch group company pays to or receives from a foreign group company for receiving or delivering a service or goods (binding on both tax authorities and tax payer).

An Advance Tax Ruling is an advance opinion from the tax authorities on the tax characterization of international corporate structures, such as advance certainty on the application of the participation exemption, hybrid financing or hybrid legal entities, classification of foreign entities (tax transparency), permanent establishments, substantial interest of non-residents and dividend payments by coops and is binding on the tax authorities.

If aspects of a cross border transaction are unclear or if the tax payer requires a degree of assurance then the Dutch tax authorities can provide an ATR or APA on the assumption of full facts and circumstances and fulfilment of substance- and risk-requirements.

As of 2014 the substance- and risk-requirements apply to all finance- and royalty (cash-flow) group companies – with or without an ATR/APA – of which the activities mainly (70% or more) consist of receiving and paying out of intercompany interest, royalties and operational- or financial-lease terms. In the corporate income tax return it has to be reported whether these conditions are met. The APA/ATR-team of the Rotterdam tax administration (large companies) deals with Advance Pricing Agreements and Advance Tax Rulings. For APA’s a ‘case-management plan’ will be drawn up together with the taxpayer. Also a ‘pre-filing meeting’ with the ATR/APA team is possible. Finally ‘small’ companies can be supported by the ATR/APA team with ‘comparables’ from their databases.

Based on the standards as set out in the OECD BEPS Action Plan as of 1 April 2016 and based on EU Directive 2015/2376 framework as of 1 January 2017, the Netherlands will automatically exchange information on new cross-border tax rulings. Under conditions, existing tax rulings of MNE under OECD framework must be exchanged by 1 January 2017 (in Dutch practice: 31 December 2017 because of the vast volume) and under EU framework with a group turnover exceeding EUR 40 mio, must be exchanged with foreign tax authorities by January 1, 2018.

Finally Dutch government made very clear in 2015 that it intends to continue their tax ruling policy as a long term tool in Dutch investment policy and not to make any unilateral steps to decrease or stop the ATR / APA policy.

2.1 Holding Companies

The main tax reasons for establishing an intermediary holding-company in The Netherlands are:

- participation exemption: The Netherlands exempts dividends from and capital gains regarding shares in subsidiaries. This is based on the principle that profits which were already taxed (at the level of a subsidiary) should not be taxed again (at the level of the parent company);
- absence of capital tax;
- extensive network of some 100 tax treaties and use of EU Parent-Subsidiary Directive;
- relatively low dividend withholding tax rates on outbound dividend payments to or inbound dividend receivables from EU and/or tax treaty countries;
- special tax treaties with the Curacao, Saint Martin and Aruba (TRK) and Caribbean Netherlands (BES islands: Bonaire, Saba, Statia (TRN));
- ATR and APA practice.
Participation exemption

Generally a Dutch company is taxed on its world wide income, including dividends received. However the CIT Act provides for a participation exemption, which is applicable to both domestic and foreign shareholdings of 5% or more. The Dutch participation exemption provides for a true and full exemption of qualifying participation income without a minimum holding period.

A shareholding of 5% or more would be considered a qualifying participation. A smaller participation also can qualify if it is a group company or if a related group company has a qualifying participation in that (NL/EU) subsidiary.

As of 2010 a 5% or more subsidiary would considered to be held as a qualifying participation if the objective, or predominant motive / intent, is to obtain a return that exceeds the return that may be expected from normal active asset management. Because of the re-introduction of this (subjective) "purpose test" as of 2010 (active) Dutch intermediary holding companies with an active shareholder and active subsidiaries should qualify for the participation exemption. The (objective) 10% ‘subject-to-tax test’ and 50% ‘asset test’ will stay as safe havens.

The above means that a Dutch Holding company is entitled to the participation exemption with respect to dividend income and capital gains derived from a subsidiary if it owns at least 5% of the nominal share capital of the subsidiary and the subsidiary meets one of the following tests:

(i) The subsidiary is not held as a passive investment (purpose test). This test should be met if (a) the Dutch holding company is active in the management, finance and/or policy making of the subsidiary or (b) the subsidiary and the Foreign Investor are active companies and their activities are interrelated; or

(ii) The subsidiary is subject to a corporate tax regime comparable to the Dutch corporate tax regime which has a statutory tax rate on profits of at least 10% (subject-to-tax test); or

(iii) Less than 50% of the (direct and indirect) assets of the subsidiary would, as a rule, comprise of passive assets (asset test).

The purpose of the rules is to exclude from the participation exemption mobile portfolio investments and passive intercompany financing activities in tax havens.

According to the asset test the activities of a subsidiary are too passive if the assets directly or indirectly (through participations of the subsidiary) consist for more than 50% of free portfolio investments. Free portfolio investments are not necessary in the business activities of the subsidiary which owns the portfolio investments. These assets only generate passive income such as interest, royalties and rental income.

Certain assets no longer qualify as "passive assets" as of 2010:

- subsidiaries with less than 30% low taxed passive assets;
- intercompany loans (historically) financed for 90% or more by third parties / banks;
- real estate;
- assets that are used in active leasing business or in intercompany leasing business (historically) financed for 90% or more by third parties /banks.

Apart from the effective 10% CIT rate itself, under the subject to tax test, also a comparison of tax base has to be taken into account. Tax base differences regarding depreciation, investment deductions, mixed costs, tonnage regime, loss compensation, fiscal consolidation will be irrelevant. However tax holidays, a cost plus approach, fictitious costs and exemptions, profit deductible dividends and a broad participation exemption can be a problem for the subject-to-tax test.

The aggregate tax rate of a foreign subsidiary and its permanent establishment(s) has to be 10%. The subject-to-tax test is met if the profit tax before credit of withholding tax is at least 10%. However a tax sparing credit can be a problem. Also classification differences (transparent / non-transparent foreign entities) between the Netherlands and other countries can be an issue and therefore have to be considered.
Moreover we note that some low taxed mobile "CFC" portfolio participations (25% or more shareholding and 90% or more portfolio investments) must be valued at market value on a yearly basis (each year profit/loss). Referring to OECD BEPS Action Plan, (CFC-rules) Dutch government does not intend to unilaterally enter into (more) CFC-rules. However EU ATAD mentions CFC-rules regarding controlled tax exempt EU PEs or EU entities (excluding PE/entity profits less than EUR 750.000 and less than EUR 75.000 non-trading income) to apply from 2019.

If the parent company or the subsidiary is considered to be a ‘fiscal investment institution’, the participation exemption does not apply. In principle the tax inspector has the burden of proof that the participation exemption is not applicable.

As of 2016 the participation exemption is not applicable anymore on income which is a dividend from Dutch perspective however a loan creating deductible interest in the other country (hybrid loans).

If the participation exemption is not applicable, the dividends/capital gains of the subsidiary are taxed with CIT at the level of the NL parent company. In that situation generally a 5% tax credit applies, sometimes a tax credit is given for paid foreign CIT (if the subsidiary qualifies for the EU Parent-Subsidiary Directive). Sometimes no foreign tax credit is granted what so ever (less than 5 % participation).

All benefits gained from shareholdings are exempt. Generally the term 'benefits' covers profits and losses. Profits comprise dividends and hidden profit distributions. Exempt returns also cover the profit realised on the sale of a participation. Consequently [currency] losses realised on the sale are not deductible.

If the value of a participation decreases as a result of losses suffered, its write-down by the parent company is not deductible. However losses arising from liquidation of a shareholding may be set off under certain conditions.

The (financing) costs associated with a shareholding are deductible. However because of participation interest rules as of 2013, the interest paid on (intercompany) loans may not or only partly be deductible from profits (see chapter one: base erosion provisions).

Purchase costs of participations are not deductible. This is the same for sales costs of participations.

If a holding company with sufficient substance, finances each participation with 15% (or more) equity and if it can obtain a Dutch tax certificate of residence, it is possible to obtain an advance tax ruling (ATR) from the Dutch tax inspector concerning the applicability of the Dutch participation exemption.

In the new ATR Decree of June 3, 2014 the Dutch authorities mention new unilateral anti-abuse measures in which Dutch holding companies will only be eligible for an ATR if they satisfy the minimum substance and risk (equity) requirements (as mentioned in Annex II) or the group to which they belong has operational activities in the Netherlands or genuine plans to start activities in the Netherlands.

If income (dividend, capital gains) from shares does not qualify for the participation exemption anymore as a result of a legislative change or change of facts, the income will be split and allocated to the period when it was taxable and when it was exempt (or vice versa). This so called compartmentalization of income from participations is codified and applies since May 2015, with retroactive effect from 14 June 2013.
Example: Dutch Coop Holding structure

2.1.1. Dutch COOP used as international holding company

Nowadays the Dutch Co-operative Association [COOP] is used more and more as a group holding company because of the possibility to repatriate dividends to the parent company (members) without any Dutch dividend withholding tax being levied. In other words: a tax free exit out of the EU.

An alternative structure can be that the COOP holds all the shares in a Dutch BV which BV holds the (foreign) subsidiaries. This is mainly done for achieving a dividend withholding tax reduction under certain Tax Treaties and because the BV is a more widely accepted and known legal vehicle.

The COOP is an association founded by at least two members by way of a deed by a civil law notary. The liability of the members of the COOP can be excluded in the deed of incorporation.

The COOP is subject to Dutch corporate income tax and is a tax resident of the Netherlands under Dutch Tax Treaties. Also European Directives (except for the EU Savings Directive and the EU Interest and Royalties Directive) apply to the COOP. Access to the EU Parent-Subsidiary Directive is important for the COOP in international structures.

**Dutch Dividend withholding tax (DWHT)**

Being an association, rather than a company, the COOP typically is not designated as a corporate entity (company) that is required to withhold dividend withholding tax upon distributions to its members. Therefore, profit distributions by the COOP to its members were not subject to Dutch dividend withholding tax until 2011.

However as of 2012 the Dutch COOP has become subject to dividend withholding tax in certain abusive cases where cooperatives are interposed to avoid Netherlands dividend tax or foreign tax. In general, from 2012 until 2015 still no dividend withholding tax will be due in new COOP structures if the membership rights belong to the business assets of the ‘active’ member of the cooperative concerned.

As of 2016 these abuse rules are put more in line with similar general anti-abuse regulations (GAAR) based on the EU Parent Subsidiary Directive. COOP arrangements that are not genuine (‘objective’ artificial structure test) and are only made to obtain the (dividend) tax benefits (‘subjective’ main purpose test), are denied these benefits. COOP structures will not be regarded as artificial if there are sound business reasons to structure in this way.
As of 2018 the anti-abuse rules will be in line with the OECD rules (BEPS AP-6). Therefore the ‘subjective’ main purpose test will be replaced by the principle purpose test (PPT). Furthermore to the ‘objective’ artificial structure test will be added with two new economic substance requirements regarding labor costs and office space.

Beneficial and acceptable (non-abusive) structures will still be:
(1) where the Dutch COOP runs an active business with employees;
(2) the member of the Dutch COOP runs an active business and the membership right is part of the business assets;
(3) interrelated active member (parent company with 'link function') in Dutch COOP has substance in accordance with Dutch standards (see Annex II).
As of April 1, 2018 also “labor costs of € 100,000 and office space for 24 months” requirements have to be met.

In the tax Bill 2018 and based on consultation in May/June 2017 is proposed to abolish the difference between Coops and NV/BV ultimately as of 2018, by still granting Coop Holdings (70% or more holding and/or group finance activities) a dividend withholding tax exemption in case of:
(i) less than 5% membership unless together with cooperative group of members more than 5% or
(ii) (non abusive) active business structure in which the foreign member of the Coop – tax resident in EU/EER or in a country with which the Netherlands has a tax treaty - holds an interest of 5% or more in the Coop, similar to participation dividends of Dutch NV/BV.

On the basis of the proposal, profit distributions by a Holding Coop to members that own 5% or more and are not resident in the EU/EEA or in a tax treaty jurisdiction will generally become subject to 15% DWHT from 1-1-2018.

**Corporate income tax issues for the foreign members of the COOP (article 17(3) CITA)**

Based on domestic Dutch legislation, entity members of the COOP with a substantial shareholding of 5% or more could (still) become subject to corporate income tax as non-resident taxpayers in the Netherlands. However the Dutch Revenue is generally willing to confirm otherwise in an ATR in so-called non-artificial ‘active’ investment structures as mentioned above. As of 2018 similar economic substance rules will apply as mentioned above. For Curacao Holdings there is a grandfathering rule until 2019. In case a tax treaty is applicable, income from substantial interest is generally only taxable in the resident state of the foreign member of the COOP.

2.1.2. Foundation Administration Office [STAK]

A type of foundation called ‘Stichting Administratie Kantoor’ [STAK] is often used for estate planning purposes as a holding company for Dutch and Belgium family owned companies.

With the use of a STAK, dividend rights [share certificates with former shareholders] and voting rights [with board of foundation] can be separated.

The STAK without an independent board of directors is generally considered to be tax transparent for Dutch tax purposes and therefore generally not subject to Dutch corporate income tax unless the STAK is engaged in active business.

2.2. Finance companies

**The tax main reasons for establishing an intra-group finance-company in The Netherlands are:**

- extensive network of some 100 tax treaties and use of EU Interest- and Royalty Directive;
- absence of capital tax;
- absence of domestic withholding tax on interest payments (outbound);
- relatively low withholding tax rates on interest receivables (inbound) from EU and tax treaty countries;
- sound business use of foreign (e.g. Curacao BV) group finance company (subject to 10% CIT);
- ATR and APA practice.

The Dutch intra-group finance company should receive an appropriate remuneration for its financing activities. Note that intra-group means connected by shareholding direct or indirect for > 33,33%.
An intra-group finance company will be considered tax resident of The Netherlands and may obtain an ATR or APA if the company meets substance- and risk requirements. 

Minimum substance requirements are mentioned in Appendix II.

Based on article 8c CIT Act an intra-group finance company is deemed to bear sufficient genuine business risk if the equity is at least 1% of the amount of the outstanding loans, or € 2 million (“equity wall”). If this requirement is not met, the interest income is not included in the tax base and therefore foreign WHT can not be credited.

The Dutch tax authorities can spontaneously exchange ruling information with the (tax treaty) source country when a Dutch intra-group finance company which activities mainly (70% or more) consist of flowing through e.g. back to back loans, does not have any operational activities in the Netherlands and does not intend to do so. Consequently the source country may deny treaty benefits. Also a penalty can be due when the tax status is not declared properly in the Dutch corporate tax return.

The arm’s length remuneration for finance transactions has to be added as a percentage to the interest charged and should consist of an annual(handling) fee and a risk premium for the equity risks incurred. The handling fee and risk premiums should be benchmarked with independent third parties. The transfer pricing information gathered should be included into a transfer pricing report containing a functional analysis of the intra-group finance transactions stating the arm’s length remuneration and interest rate.

To reduce the administrative burden the Dutch Tax Revenue provides assistance to small companies in preparing a transfer pricing report, which is required in order to obtain a tax ruling. “Small” companies with less than 50 employees and a value of the commercial assets of less than € 6 million could apply for such assistance (see chapter 7).

2.3. Royalty / Lease companies

The main tax reasons for establishing an intra-group royalty / lease company in The Netherlands:

- extensive network of some 100 tax treaties and use of EU Interest- and Royalty Directive;
- absence of capital tax;
- absence of domestic withholding tax (WHT) on royalty / operational lease payments (outbound);
- low WHT rates on royalty receivables (inbound) from EU and tax treaty countries;
- Innovation box regime (see chapter 1);
- ATR and APA practice.

The Dutch intra-group royalty company should receive an appropriate remuneration for its licensing or lease activities. Note that intra-group means connected by shareholding direct or indirect for >33.33%.

An intra-group licensing or lease company will be considered tax resident of The Netherlands and may obtain an ATR or APA if the company meets substance- and risk-requirements.

Minimum substance requirements are mentioned in Appendix II.

An intra-group licensing or lease company is deemed to bear sufficient genuine business risk if the equity is at least 50% of the average expected annual gross royalty/lease payments, or € 2 million. In order for this equity to be at risk, at least 50% of the minimum equity required has to be paid upfront to the licensor / lessor to incur market risk. In addition a certain amount of debtor risk must be incurred (“equity wall”). If this requirement is not met, the royalty/lease income is not included in the tax base and therefore foreign WHT can not be credited.

The Dutch tax authorities can spontaneously exchange ruling information with the (tax treaty) source country when a Dutch intra-group licensing or lease company which activities mainly (70% or more) consist of flowing through e.g. lease in – lease out, does not have any operational activities in the Netherlands and does not intend
The arm’s length remuneration for intra-group licensing or lease transactions has to be added as a percentage to the royalty charged and should consist of an annual (handling) fee and a risk premium for the equity risks incurred. The handling fee and risk premiums should be benchmarked with independent third parties. The ‘loan connector’ is an example of a database that can be used for benchmarking purposes. The transfer pricing information gathered should be included in a transfer pricing report giving a functional analysis of the intra-group licensing or lease transactions stating the arm’s length remuneration.

To reduce the administrative burden the Dutch Tax Revenue provides assistance to small companies in preparing a transfer pricing report, which is required in order to obtain a tax ruling. “Small” companies with less than 50 employees and a value of the commercial assets of less than €6 million could apply for such assistance (see chapter 7).

3. Distribution/coordination centres

A Dutch company can operate as a Headquarter on behalf of the foreign group companies and combine several functions or activities (for instance: administration, logistics, marketing, HRM) to be performed for the group.

The fees for intra-group services generally need to be at arm’s length. However based on the Dutch TP Decree, headquarters in the Netherlands are allowed under conditions to provide intra-group support services (such as bookkeeping-, legal-, tax- and HRM- services) on a full-cost basis in stead of applying a (cost plus) mark up or arm’s length price. Also a non-exhaustive list of shareholders’ activities that are regarded as (non-chargeable; without commercial or economic value) shareholders’ costs and therefore only deductible by the Dutch Headquarter, has been published.

Based on the OECD BEPS Action Plan (Transfer Pricing aspects) a net cost plus mark up of 5% is proposed for low value adding intra-group services. The Dutch 2013 TP Decree may therefore need to be amended to reflect the guidance from the OECD on these services.

Foreign investors can contact the International Investors’ Desk (APBI or Greenfield team) for information on the tax implications of a first potential investment in the Netherlands of more than €4.5 million. The APBI is authorised to provide advance certainty (Greenfield rulings), within the context of the law, case law and policy, on, for example, corporate income tax, wage withholding tax, dividend tax, income tax and value added tax for a period of 10 years or more. The APBI also acts as the point of contact for import duties and excise duties.

4. Avoidance of double taxation methods for intermediary companies

Dividends, interest and royalties are taxable in the resident state of the recipient/beneficial owner. However also the source state has a limited taxation right (up to 15%; actual percentages differ per tax treaty and/or EU Directive). Double taxation on dividends, interest and royalties for intermediary companies may be avoided by means of the credit method or by deducting foreign withholding taxes as costs.

- The credit method
  The Dutch corporate income tax (CIT) is reduced by the foreign tax levied (first limit) or by the Dutch tax payable (second limit) on the foreign dividends, interest and royalties, whichever is lower. Furthermore the foreign dividends, interest and royalties must be subject to Dutch CIT. For instance dividend withholding tax regarding dividends exempt under the Dutch participation exemption or dividends as part of foreign PE profits, can not be credited.
  In case of total ongoing distribution of the dividends received, 3% of that amount can be credited against...
the Dutch dividend withholding tax due on ongoing dividend distribution. Since the foreign withholding taxes entitled to a tax credit in the Netherlands are usually levied on a gross basis, whilst Dutch CIT is levied on a net basis (after deduction of costs), it is quite possible that the Dutch CIT base will not be sufficient to provide a full credit for the withholding tax collected in the source country. In these cases the excess of the foreign tax not credited may be ‘carried forward’ and, where possible, credited in subsequent years. The credit method for Dutch intermediary companies only applies when certain substance and risk requirements are met (see chapter 2 / Annex II).

Tax sparing credit facilities (Dutch credit granted although no or low withholding at source state) in the tax treaties with Brazil, China, Pakistan, Philippines, Sri Lanka, Surinam and Zambia have no expiration date. Under the 2001 Unilateral Decree on the Avoidance of Double Taxation, which applies in non-treaty situations, the credit method only applies to foreign dividends, interest and royalties from designated (extensive list) developing countries.

- **Deduction as costs**

In situations in which there are no arrangements for avoiding of double taxation, foreign withholding taxes may be deducted as costs related to the relevant income. Also, in situations in which a credit would be granted for dividends, interest and royalties, the taxpayer may opt for deduction of foreign withholding tax.

## 5. EU-Directives

**Parent-Subsidiary Directive**

This Directive abolishes dividend withholding tax on dividends paid within the EU from subsidiaries to parent companies (or to a permanent establishment of the parent company). This Directive generally applies to shareholdings of at least 10% (for Dutch tax purposes generally 5% participating interest will be sufficient). Additional criteria are applicable to parent and subsidiary, such as: a certain legal form and the condition that the subsidiary should be subject to corporate tax without the possibility of being exempt. Similar exemption of Dutch dividend withholding tax is available in relation to Switzerland, Norway and Iceland. European Council approved in December 2014, a revision of the Parent-Subsidiary Directive including tightened (minimum) anti-abuse clauses (principle purpose test regarding artificial structures) and a proposal to exclude interest payments on cross-border hybrid loans from a tax exemption (OECD BEPS Action Plan: hybrid mismatches). Implementation by change of the participation exemption is arranged for in the Dutch tax legislation as from 2016. The EU Anti Tax Avoidance Directive (ATAD) mentions double deduction and deduction without inclusion as hybrid mismatches to be denied.

Curacao, St. Martin, Caribbean Netherlands (former Netherlands Antilles) and Aruba are in this context (non-EU) overseas countries and territories ("OCT") which can generally not benefit from EU directives.

**Merger and Split Directives**

Because of this directive, under certain conditions a business merger (business-for-share exchange) and a share merger (share-for- share exchange) and split-ups and split-offs between a Dutch company and an EU corporation can take place without triggering Dutch corporate income tax.

**Transfer Pricing Arbitration Treaty**

The arbitration treaty deals with arbitration regarding corresponding adjustments where the tax authorities of one EU member state adjust a transfer price and the other EU member state refuses to make a corresponding adjustment. In 2006 and 2009 the EU adopted a Code of Conduct on transfer pricing documentation that companies must provide to tax authorities with regard to their pricing of cross-border intra-group transactions. The Netherlands has a flexible approach regarding transfer pricing documentation requirements and do not prescribe a specific and exhaustive list of information that taxpayers should maintain in their records.
Also the format of the EU TP Documentation resolution may be used. The Dutch tax authorities are in particular focused on the alignment between functions performed and risks assumed and the arm’s length remuneration. See also similar approach in OECD BEPS Action Plan. The Dutch TP Decree in general adopts the OECD TP Guidelines for MNE and Tax Administration regarding transfer pricing methods and clarifies any indistinctness.

Based on OECD BEPS Action Plan (TP documentation and CbC reporting) the Dutch government introduced the following tax transparency standards:

1. a Local file and a Master file for companies which are part of a Multinational Enterprise with a consolidated turnover from EUR 50 mio up to EUR 750 mio during the prior year and additionally;
2. ‘country by country’ reporting of TP policy for MNE with consolidated revenue exceeding EUR 750 mio, which is applicable on the Dutch Ultimate Parent Entity of such large MNE’s (or other Dutch group entities of large MNE’s if CbC-reports are not received by automatic exchange of information with the country of the Ultimate Parent);
3. Up to EUR 50 mio MNE consolidated turnover, the current TP documentation requirements remain applicable (article 8b CIT Act).

The Master- and Local-file needs to be on file before filing of the corporate tax return as of 2016 (generally June 1, 2017), the CbC report within 12 months after the end of the fiscal year (December 31, 2017).

This is the global trend: multilateral cooperation between tax authorities worldwide to provide a global picture of the operations of MNE’s. In July 2017 the OECD published their TP Guidelines 2017 with amendments as set out in their BEPS Action Plan.

The Savings Tax Directive applied to interest earned on savings held by individuals in an EU member state until 2015, but did not affect interest paid to companies. The new EU Directive 2016 follows CRS (common reporting standard) regime similar to US FATCA legislation, as a legal framework to identify the underlying ultimate beneficial owner(UBOs) of foreign accounts to combat tax evasion (by individuals). Additionally the Netherlands has entered into Tax Exchange of Information Agreements (TEIA´s) with most of the mayor tax havens around the world.

The register for ‘ultimate beneficial owners’, also referred to as the UBO register, is the result of the 4th Anti-Money Laundering Directive and has to be implemented in the legislation of the Member States on June 26, 2017 and applied for as of 2018. Virtually almost all legal entities incorporated under Dutch law will be obliged to register their ultimate beneficial owners. In the Netherlands the UBO register will be a public register. For a small fee, everyone will be able to search for the ultimate beneficial owner of an entity. To protect the privacy of the ultimate beneficial owners, a number of safeguards are attached to the register, however.

This Directive seeks to eliminate withholding taxes on payments of interest and royalties made between associated companies (shareholding 25% or more) from different EU member states. Some EU countries had a transitional regime until 2011. Similar exemption of interest/royalty withholding tax is available in relation to Switzerland. It is expected that similar anti-abuse rules as mentioned in the Parent Subsidiary Directive will be introduced as of 2018.

Exchange of tax rulings Directive (2015/2376)
Based on the standards as set out in the OECD BEPS Action Plan as of 1 April 2016 and based on EU Directive 2015/2376 framework as of 1 January 2017, the Netherlands will automatically exchange information on new cross-border tax rulings. Under conditions, existing tax rulings of MNE under OECD framework must be exchanged by 1 January 2017 (in Dutch practice: 31 December 2017 because of volume) and under EU framework with a group turnover exceeding EUR 40 mio, must be exchanged with foreign tax authorities by 1 January 2018.
Anti Tax Avoidance Directive (ATAD 1 and 2)
Contains rules - to be applied as of 2019 by EU members - against the erosion of tax bases in the internal EU market and the shifting of profits out of the internal EU market; i.e. limitations to deductibility of interest rules, exit taxation rules, a general anti-abuse rule (main purpose test), controlled foreign company rules and rules to tackle hybrid mismatches (double deduction in both states or a deduction of the income in one state without inclusion in the tax base of the other; extended to third countries under ATAD-2, including non-taxation without inclusion and double tax credits).

CCCTB
The EU also promotes (the re-launch of) the CCCTB (common consolidated corporate tax base) project. The Netherlands government is not a promoter of the harmonization of the corporate income tax system of the different EU member states, with consolidation of profits by way of a mechanical method of profit allocation based on level of employees, material assets and turnover.

State Aid
In the EU state aid by way of preferential tax regimes is not allowed. Recently the European Commission ruled that the beneficial tax ruling regarding the coffee activities of Starbucks in The Netherlands can be labeled as state aid. The Dutch government did appeal to the decision by the EC stating that the Dutch tax ruling in this case was in accordance with OECD Transfer Pricing standards and therefore should not consist state aid. See also appeal by Dutch sea ports at EU Court of Justice regarding corporate tax liability because of state aid investigation regarding Belgium and French sea ports is still ongoing.

6. The Dutch Caribbean – Netherlands Relationship
Dutch intermediary companies are often held by a Curacao holding company. The main reasons for this structure are:

- special tax treaties between The Netherlands and St. Martin / Aruba (Tax regulation of the Kingdom - TRK) and Curacao (Tax regulation Curacao – TRC) and Caribbean Netherlands (Tax regulation Netherlands - TRN);
- absence of domestic Curacao withholding tax on dividend-, interest- and royalty payments (outbound);
- absence of Dutch withholding tax on interest- and royalty receivables and low dividend withholding tax on dividend receivables from The Netherlands (inbound);
- Curacao participation exemption exempts from CIT, dividends from and capital gains regarding shares in qualifying subsidiaries;
- absence of capital tax;
- ruling policy of Curacao tax authorities.

The Tax Regulation of the Kingdom (TRK) or in Dutch "Belasting Regeling voor het Koninkrijk" (BRK) is a tax regulation between the member states of the Kingdom of the Netherlands, being the Netherlands, Curacao, St. Martin and Aruba. The TRK is comparable to a treaty for the avoidance of double taxation. The new TRC with Curacao did become effective on 1 January 2016 and the new TRSM with St. Martin on March 1, 2016. As of 10-10-2010 the BES-islands (Bonaire, Saba, Statia) have become a Dutch Public Entity called 'Caribbean Netherlands' (special municipality of the European Netherlands). As a main rule Dutch CIT rates of 20% - 25% will generally be applicable for corporate entities in BES as of 2011. However advantageous BES- tax legislation can be applicable for ´active´ qualifying entities (with substance) upon request (5% distribution tax regime) and for qualifying PE´s of foreign entities (no distribution tax). The Tax Regulation Netherlands (TRN) which is comparable to a tax treaty will prevent double taxation as of 2011. Additionally per 10-10-10 Curacao and St. Martin got a ´status aparte´ as autonomous countries similar to Aruba.
The TRC provides for a reduction of Netherlands dividend withholding tax to 15% if the dividends are received by a Curacao resident company or individual. Moreover, the new TRC provides for a further reduction of Netherlands dividend withholding tax if LOB-provisions are complied with; a dividend withholding tax of 0% for active qualifying Curacao companies with sufficient substance deriving dividends from qualifying Dutch participations of 10% or more. Furthermore for a transitional period until 2019 only 5% (used to be 8.3%) will be imposed on dividend distributions by a Netherlands company to a Curacao non-qualifying company if the Curacao company holds at least 25% of the share capital of the Netherlands company. For refunds, form IB95(2) can be used. To use a Dutch coop as a subsidiary in “active” (new) Curacao holding structures can also be a solution to avoid Dutch dividend withholding tax.

Below an overview of the withholding tax rates.

<table>
<thead>
<tr>
<th>Country:</th>
<th>Dutch Interest/royalties withholding tax %</th>
<th>Dutch dividend withholding tax %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Curacao</td>
<td>0</td>
<td>15-5-0</td>
</tr>
<tr>
<td>St. Martin</td>
<td>0</td>
<td>15-5-0</td>
</tr>
<tr>
<td>Aruba</td>
<td>0</td>
<td>15-7.5-5</td>
</tr>
<tr>
<td>Bonaire/Saba/Statia (C.N./BES)</td>
<td>0</td>
<td>15-5-0 (*)</td>
</tr>
</tbody>
</table>

(*) The Caribbean Netherlands / BES-islands have the legal status of a Dutch public entity. Participation dividends from European Netherlands [as of 10% shareholding] can apply for 0% DWHT, however on dividends from Caribbean Netherlands always 5% applies.

**Dutch (NL/CUR) Sandwich**

**Curacao Corporate income tax (CIT)**

All companies resident in Curacao are subject to profit tax on their worldwide income. The effective tax rate is 22% as of 2016 [2015: 25%]. For the future a CIT rate of 15% is planned for Curacao and St. Martin.

An offshore company is a company established in the Netherlands Antilles which derives its income from sources outside the Netherlands Antilles. As of January 1, 2002 the special offshore tax regime has ceased to exist. However there is a transitional offshore regulation until January 1, 2020. In this connection dividends, interest and royalties derived by a Netherlands Antilles ruling company incorporated before 1 January 2002 will be subject to a tax rate of 2.4% to 3% up to 1 January 2020.
Special incentives are available for captive insurance companies, manufacturing companies, hotels, shipping and air transport companies, land development companies and (trading) companies engaged in activities in the so-called Free Zone. Insurance premiums at arm’s length paid to Curacao group captive insurance company are generally deductible in The Netherlands. International maritime service companies using sea vessels may opt for the new tonnage tax regime, which regime is extended as of 2015 (e.g. mega yachts, dredges, tug boats, etc).

As of 2006 a new ruling practice has been introduced. Each ruling request must be substantiated and relevant information for determination of the arm’s length prices has to be provided. According to new legislation as of 2009 the existing ruling policy regarding non-risk bearing intra-group finance- and licensing activities is partially codified; taxation is usually based on cost-plus approach.

Also an improvement of the participation exemption was introduced in 2009. Curacao 100% exempts from CIT, dividends from and capital gains regarding 5% or more participations (share capital of $500.000 also qualifies) in qualifying (subject-to-tax test: 10% CIT and non-portfolio investment test: >50% income from active business activities) subsidiaries. As of 2015 5% or more participations in Dutch funds for joint accounts will also qualify. If both tests are not met, a 54,5% participation exemption applies. The tests do not apply to subsidiaries with 90% or more real estate.

Generally a 54,5% participation exemption also applies if the subsidiary is a CIT exempt Curacao private limited liability company (CUR B.V. or N.V.). The exempt CUR B.V./N.V. is often used in so called cash box investment structures with an effective tax rate of 10,01% ((100% -54,5%) x 22%). The CUR B.V./N.V. can also be used for IP activities (and a 10% CIT CUR B.V./N.V. regime is applicable for intra-group financing and for low taxed mobile investment participations).

Curacao also has special regulations for e-commerce activities established in the so-called F-zone. The benefits:
- An exemption from turnover tax and import duties;
- 2% profit tax rate.

Moreover, as of 2014 an export regulation is introduced with an effective rate of 4% regarding international qualifying export activities which comply with certain substance requirements.

Finally Private Foundation (SPF) legislation was introduced quite similar to the Anglo trust. A SPF can opt for a 10% CIT regime. Also a Transparent LLC (NV/BV) and Curacao trust legislation was introduced in Curacao.

In 2016 Curacao became a BEPS Associate for the 'minimum standards' regarding CbC reporting. As of 1 July 2016 cassation proceedings at Dutch Supreme Court are possible in Dutch Caribbean tax cases.

**Aruba and Caribbean Netherlands (Bonaire, Saba, Statia): aircraft lease**

To register and finance aircraft, an (transparent) Aruba Exempt Company (AEC) or a Caribbean Netherlands NV/BV which falls under the scope of the Dutch corporate income tax and therefore gives access to Dutch residence certificates with some 100 Dutch tax treaties and Dutch corporate group regime, can be very useful.

In case of mainly (70% or more) intra-group lease in – lease out activities in Caribbean Netherlands - taxable with Dutch corporate income tax - the substance and risk requirements as mentioned in chapter 2.3 will apply. Big ticket leases are generally between independent parties using orphan entities in the Kingdom of the Netherlands. As of 1-9-2010 the Convention on International Interests in Mobile Equipment (CIME) and the related Aircraft Equipment Protocol (AEP) is applicable to Aruba and Curacao, St. Martin and BES-islands (Bonaire, Saba, Statia). As of 10-10-10 BES-islands became a Dutch public entity called Caribbean Netherlands. This gives banks, financiers and owners / lessors extensive international (secured interests law) protection against (financial) problems of defaulting or insolvent operators / lessees of aircraft, aircraft engines and helicopters in these jurisdictions. Application of CIME/AEP should be a sound business reason to finance aircraft by means of the Aruba- and/or Caribbean Netherlands - Route.
7. Legal and Management aspects

The legal form of most businesses in The Netherlands are private limited liability companies (“Besloten Vennootschap”) or public limited liability companies (“Naamloze Vennootschap”). A non-quoted Dutch company is normally incorporated as a B.V.

A BV or NV must be incorporated by one or more incorporators by means of a notary deed of incorporation containing the company’s articles of incorporation. A BV or NV may have a single shareholder. The shareholders may be either individuals or legal entities; their nationality is irrelevant.

A declaration of no objection of the Dutch Ministry of Justice is required before a NV can be incorporated. A BV or NV must have an authorized capital, divided into a number of shares, each of which has a par value expressed in euro’s. As of October 1, 2012 Dutch law does not require anymore a minimum issued and paid-in capital for BV companies, however for NV companies still € 45.000 (25% of the issued share capital) is required.

Limited liability companies are independent legal entities. The liability of shareholders is generally limited to their capital subscriptions. Directors of the company however can be liable to all debts of the company in case of malpractice and or BV companies not fulfilling the distribution test (see below). The incorporation process will take a minimum of two weeks. As an alternative it is possible to purchase a company from the shelf.

On October 1, 2012 the so called "BV-light" or "Flex-BV"-regime is introduced. The main features are reduction of the minimum share capital requirements, introduction of a distribution test and simplification of publication requirements. In the case of a distribution of assets or dividends, or the repurchase or redemption of shares of a BV, the directors have to assess whether the BV is able to fulfil all its obligations due and payable (one year) after these transactions. If the directors do not fulfil the distribution test, they would become personally liable for resulting damages. Shareholders have a repayment obligation.

Large BV’s must have a supervisory board (in Dutch ‘Raad van Commissarissen’) which carries out a supervisory function over the managing board on behalf of the shareholders. A supervisory board is required only in so called "structure" companies (in Dutch 'structuur vennootschappen') which are N.V.'s or B.V.’s with an equity exceeding € 16 million and at least one hundred employees in the Netherlands and a works council.

Exchange control
No license is required for payments in euros between residents and non-residents. However some information must be reported to the Dutch Central Bank (De Nederlandsche Bank) for statistical purposes based on the 2003 Reporting Provisions. Furthermore based on the Dutch Banking Act, finance companies are, in general, required to report their Dutch business activities to the Central Bank.

Audit requirements
Requirements for the annual reporting and the period of time for preparation and adoption thereof are displayed in the following table:

<table>
<thead>
<tr>
<th></th>
<th>Private (limited liability) company</th>
<th>Public limited (liability) Company</th>
<th>Cooperative, Guarantee company Commercial corp.</th>
<th>Commercial foundation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparation by</td>
<td>Management</td>
<td>Management</td>
<td>Management</td>
<td>Management</td>
</tr>
<tr>
<td>Period</td>
<td>Within 5 months after balance sheet date, extended by a period of max. 6 months</td>
<td>Within 6 months after balance sheet date, extended by a period of max. 5 months</td>
<td>General meeting of shareholders</td>
<td>General meeting of shareholders</td>
</tr>
<tr>
<td>Adoption by</td>
<td>General meeting of shareholders</td>
<td>Board of Directors</td>
<td>General meeting</td>
<td>Statutory organ</td>
</tr>
<tr>
<td>Approval by</td>
<td>-</td>
<td>General meeting</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Period</td>
<td>Within 2 months after preparation</td>
<td>Within 1 month after preparation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publication Requirement</td>
<td>Within 8 days after preparation / approval. At least within 12 months after balance sheet date.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The extent to which the information required by the law has to be included in the annual financial statements depends on the size and type of the company concerned.

A distinction is made between:

- micro, small, medium-sized and large companies;
- group companies;
- insurance companies;
- credit institutions.

Companies are categorized as micro, small or medium-sized if during two consecutive financial years they have not exceeded at least two of the following three figures:

<table>
<thead>
<tr>
<th></th>
<th>Micro</th>
<th>Small</th>
<th>Medium-sized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total assets</td>
<td>&lt; € 350,000</td>
<td>&lt; € 6,000,000</td>
<td>&lt; € 20,000,000</td>
</tr>
<tr>
<td>Net turnover</td>
<td>&lt; € 700,000</td>
<td>&lt; € 12,000,000</td>
<td>&lt; € 40,000,000</td>
</tr>
<tr>
<td>Average number of employees</td>
<td>&lt; 10</td>
<td>&lt; 50</td>
<td>&lt; 250</td>
</tr>
</tbody>
</table>

These figures include the figures for subsidiaries on a consolidated basis. They do not apply to insurance companies and credit institutions.

Documents to be filed at the Dutch chamber of commerce are:

a. large companies: full balance sheet, full profit and loss account and notes thereon, annual report and other information;

b. medium-sized companies: limited balance sheet, limited profit and loss account and notes thereon, annual report and other information;

c. small companies: summary of balance sheet and notes thereon;

d. micro entities: summary of balance sheet

If the company has subsidiaries, consolidated group accounts should be included. The consolidated accounts of the Dutch intermediary company does not have to be published at the Dutch trade register (only a summary for small companies with the note that the exemption for consolidation is used), in case the consolidated accounts of the foreign (ultimate) parent company are published in the Netherlands.

In principle all companies other than those classified as small are required to be audited.

As of June 12, 2008 it is possible for small companies to draft their annual accounts (as of the tax year 2007) in accordance with the valuation of assets and liabilities as mentioned in the corporate income tax return. Based on these accounts a shortened CIT return can be drafted. If also a special horizontal supervision ‘HT’ ruling is applicable, these corporate tax returns can already be filed in XBRL. In the Netherlands all communications between the tax authorities and tax payers will be fully digitalized; each tax payer will have a digital mailbox.

As of 6-12-2010 Company registration at the Dutch trade register automatically leads to tax registration.

**WWFT: Client Identification (WID) and Reporting of Unusual Transactions (MOT)**

In the context of the fight against money laundering, the obligations as imposed by the WID require the service providers to identify the client and their source of funds before service may be provided.

Under the MOT, unusual transactions considered to be money laundering, for which objective and subjective indicators are defined in law, must be reported to a special reporting office falling under the competence of the Ministry of Justice. Both WID and MOT Acts were already applicable for Dutch banks and also apply to services by notaries, lawyers, tax advisors, auditors and trust companies as of June 1, 2003. As of August 1, 2008 WID and MOT are amalgamated in the Act on prevention of money laundering and financing of terrorism (WWFT).
Annex I. Withholding tax rates in Dutch Tax Treaties

This annex contains an overview of withholding taxes on dividends, interest and royalties according to the tax treaties concluded by The Netherlands.

The domestic dividend withholding tax in The Netherlands is 15% (as of 2007).
The Netherlands do not levy interest- and royalty withholding tax.
As of 2018 there will be a dividend withholding tax exemption for outbound participation dividends.
Interest on profit sharing bonds and participation loans is generally subject to dividend WHT.

In tax treaty situations it has always been the intent of the Netherlands to reduce the dividend withholding tax rate to 15% on “portfolio” dividends and to 0% DWHT for participation dividends. The Dutch government proposed in the tax Bill 2018 to put this intent regarding participation dividends under conditions – (non abusive) active business structure in tax treaty and EU/EEA situations - in hard law to be applied as of 2018.
The lower rate for participation dividends applies, in the below mentioned overview, if the recipient is a company that owns at least 25% of the capital of the dividend distributing company.

<table>
<thead>
<tr>
<th>Overview of withholding tax rates under Dutch tax treaties:</th>
<th>Dividends</th>
<th>Interest</th>
<th>Royalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic NL rates</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Treaty rates treaty with: Albania</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>15</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Treaty rates treaty with: Argentina</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>0/5</td>
<td>0/5/10</td>
<td>10</td>
</tr>
<tr>
<td>Treaty rates treaty with: Armenia</td>
<td></td>
<td></td>
<td></td>
</tr>
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<td>10</td>
<td>12</td>
<td>3/5/10/15</td>
</tr>
<tr>
<td>Treaty rates treaty with: Aruba (7)</td>
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<td></td>
</tr>
<tr>
<td>15</td>
<td>5/7.5</td>
<td>0</td>
<td>0</td>
</tr>
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</tr>
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<td>0/10(0)</td>
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<td>Treaty rates treaty with: Azerbaijan</td>
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<td>7.5/10</td>
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<td>Treaty rates treaty with: Barbados</td>
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<tr>
<td>15</td>
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<td>3/5/10</td>
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<tr>
<td>Treaty rates treaty with: Belarus</td>
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<tr>
<td>Country</td>
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<tr>
<td>Zambia (6)</td>
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<td>5</td>
<td>10</td>
</tr>
</tbody>
</table>
(1) tax treaty still in force after split or separation from the (former) Soviet union / Yugoslavia
(2) new tax treaty in force as of 2011 with Caribbean Netherlands (Tax regulation Netherlands - TRN)
(3) new tax treaty signed 10-8-2012; treaty not yet in force
(4) tax treaty is no longer be effective from 1 January 2014
(5) new treaty in force as of 2015
(6) re-negotiations by Netherlands government with 23 developing countries for cooperation to combat treaty abuse, five of which have already agreed upon new anti-abuse articles (Ghana, Ethiopia, Malawi, Kenya, Zambia) with LOB-test (publicly traded-, shareholder-, active-trade/business- and HQ- test) regarding dividend-, interest- and royalty-income. Indonesia did not enter into a separate anti-abuse provision.
(7) new tax treaty with Curacao in force as of 2016; St. Martin (in force 1-3-16) and Aruba will follow shortly;
(8) new treaty in force as of 2016; also in July 2015 published MoU on spontaneous exchange of information with respect to ATRs and APAs.
(9) Dutch holding companies without substantial economic activities on Brazilian grey list (under dispute by Dutch tax authorities).
(10) United States has a new Model tax treaty 2016 to be BEPS compliant.

**Dividends**
The ‘zero’ between brackets (0) – as shown in the overview - is the 0% dividend withholding tax based on the EU Parent Subsidiary Directive (as of 2009: shareholding in subsidiary at least 10% or according to Dutch domestic law only 5%). Similar domestic NL rules apply regarding EFTA countries Norway and Iceland.
In December 2014 the EC has approved amendments in the Parent-Subsidiary Directive that consist of tightened (minimum) anti-abuse clauses and changes to exclude deductible payments on cross border hybrid loans from a tax exemption in the creditor state. Implementation is arranged for in Dutch tax legislation 2016.

**Interest/Royalties**
The ‘zero’ between brackets (0) – as shown in the overview - is the 0% interest and royalty withholding tax for payments between associated companies (shareholding 25% or more) in EU countries as of 2004 and is based on the EU Interest and Royalties Directive.

**Treaty shopping**
The Dutch government supports international measures such as the BEPS (Base Erosion and Profit Shifting) project from OECD and EU parent subsidiary Directive and EU ATAD changes, to prevent the granting of tax treaty- or EU directive- benefits in inappropriate circumstances.

If an entity is established in a jurisdiction outside the residence state of the parent entity for a valid commercial reason, the issue of treaty abuse does generally not arise.

However in case of treaty shopping, it is relevant to examine as to whether the interposed Dutch intermediate of a multinational group can claim benefits as a tax resident under the Dutch tax treaties.

Anti-abuse provisions in the relevant bilateral tax treaty can limit tax treaty benefits, such as:
- beneficial ownership (BO) requirements: an obligation to pass on the payment must be unrelated to the payment received e.g. as a debtor to financial transactions;
- limitation on benefits (LOB) provisions: seek to ensure that there is sufficient connection between entity and the country of residence by LOB (objective) tests, which are generally based upon the legal nature, ownership in and activities of the entity;
- principal purpose test (PPT): the principle purpose or one of the main purposes, may not be to take advantage of the tax treaty, unless this would be in accordance with the object and purpose of the tax treaty;
referral to national anti-abuse provisions.

According to OECD BEPS Action Plan (AP-6) as a minimum level of protection to prevent tax treaty shopping, any of the following tests in tax treaties would be sufficient:

1) PPT rule alone;
2) simplified LOB rule + PPT;
3) detailed LOB rule + restricted PPT rule applicable to conduit arrangements.

Conduit arrangements are regarded as abusive under the updated anti-abuse rules (LOB/PPT) and therefore would apply to deny tax treaty benefits.

The purpose of a tax treaty can generally be found in the title and preamble, the relevant tax treaty articles, OECD Commentary and examples in the final report on AP-6 Therefore it is made more clear in the title and preamble of the tax treaty that it is intended to eliminate double taxation, however is not intended to be used to generate double non-taxation. Furthermore the final BEPS report 2015 on AP-6 contains examples that should not be considered to be a conduit arrangement for that purpose e.g. valid commercial structures.

The Netherlands signed (with another 67 jurisdictions) on June 7, 2017 the multilateral instrument (MLI treaty of AP- 15) to implement the BEPS minimum standards (hybrid mismatches, treaty abuse, avoidance of PE status, improvement dispute resolution on a multilateral basis. The MLI treaty will exist next to the relevant bilateral tax treaty. Anti-abuse rules will only be effective if both treaty partners made the same choice. See MLI Matching Database. The Netherlands choose the PPT under AP-6.

End of June 2017 no tax treaties have been modified by the MLI. The MLI will only enter into force after five signatories have ratified it. Subsequently, it will begin applying to specific tax treaties once both parties to a given treaty have ratified the MLI and provided both have listed the MLI treaty as a “Covered Tax Agreement” in their Reservations and Notifications.

Unilateral (national) anti-abuse provisions mentioning substance- and risk-requirements regarding Dutch intra-group finance, royalty and lease conduit companies can also limit tax treaty shopping possibilities (article 8c Corporate Income Tax Act and Annex II of this memo). Also in the Netherlands it is generally accepted that artificial or simulated transactions may be ignored by the tax administration and the courts of appeal under a substance over form approach.

Finally the Dutch abuse of law (judicial) doctrine [fraus legis] may be applicable in situations where a tax payer undertakes a transaction exclusively or predominantly with the objective of obtaining a tax advantage that is in conflict with the legislative intent. The transaction in dispute may be converted to the closest equivalent which does not give rise to an abuse of law. Fraus legis does not apply to transactions in which the tax payer primarily has a commercial motive.

Dispute resolution
Based on the BEPS Action Plan the Netherlands will propose binding dispute resolution in tax treaty negotiations on a bilateral basis in case a MAP (mutual agreement procedure) does not come up with a solution in the cross border dispute.
Annex II

Dutch list of minimum substance (commercial/operational presence) requirements regarding intra-group (finance, licensing and lease) services:

- at least half of the statutory directors and the directors competent to make decisions reside in the Netherlands (individuals) or have a place of effective management situated in the Netherlands (non-individuals);
- the directors resident in the Netherlands (individuals) or with a place of effective management situated in the Netherlands (non-individuals), have the professional knowledge required to properly perform their duties. The tasks of the (joint) directors include, at the very least, taking decisions – based on the legal entity’s own responsibility and within the framework of normal intra group involvement – on transactions concluded by the legal entity as well as ensuring a proper execution of all of the concluded transactions.
- The legal entity has qualified staff at its disposal (either its own staff or obtained from third parties) who can adequately perform and record the transactions conducted by the legal entity.
- managerial decisions should be taken in the Netherlands.
- the legal entity’s (main) bank accounts should be maintained in the Netherlands.
- the legal entity’s accounts should be kept in the Netherlands. The legal entity should have complied with all of the relevant requirements relating to the submission of tax returns, at least until the date on which its application is assessed. This applies equally to all forms of tax, including corporation tax, wage withholding tax, VAT, etc.
- the legal entity’s registered office must be located in the Netherlands.
- the legal entity is, to the best knowledge of the entity, not regarded as (also) tax resident in another country.
- the legal entity assumes a genuine risk - as meant in article 8c sub 2 CIT Act 1969 - with regard to the loans or legal relations and the connected loans or legal relations which form the basis of the flow through interest-, royalty- and (operational / financial) lease-terms.
- the legal entity’s equity should be adequate in relation to the functions performed (taking into account the assets used and the risks assumed).

Further information

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