Dutch Holding-, Finance- and Royalty Companies 2020

(An introduction to the main Dutch tax matters)

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Introduction

The Netherlands is fiscally attractive to establish a 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 tax, legal and economic advantages of The Netherlands:

- the participation exemption (100% corporate tax exemption for dividends and capital gains from qualifying participations);
- absence of domestic capital tax;
- absence of domestic interest- and royalty-withholding tax;
- exemption of dividend withholding tax upon outbound distribution of participation dividends in case of 5% or more shareholding or membership (coop) by parent company in tax treaty state or EU/EEA in active (non-abusive) structures;
- absence of dividend withholding tax upon outbound profit distributions by Dutch COOP holding company, running a business, to its foreign members in active (non-abusive) investment structures;
- advance tax ruling (ATR) and advance pricing agreement (APA) policy with a thorough assessment based on comprehensive information required from the taxpayer;
- special tax treaties between the European part and the Caribbean part of the Kingdom of the Netherlands: 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;
- extensive tax treaty network of some 100 tax treaties with relatively low (inbound/outbound) dividend- and (inbound) interest/royalty-withholding tax rates;
- some 50+ air/sea transport treaties / agreements to avoid double taxation on international air/sea transport profits if no tax treaty is available with similar arrangements;
- some 20+ social security treaties e.g. with US, China, Japan and application of the EU social security Decree;
- 30% wage tax ruling for expats recruited from abroad including job-rotation within MNEs;
- 7% Innovation Box regime for corporate tax purposes and R&D wage tax reduction;
- tonnage tax regime for international maritime shipping companies;
- reverse charge rule regarding import VAT (Netherlands: VAT gateway to EUrope);
- extensive investment protection treaty network of some 100 investment agreements (IPAs) for protection against nationalization of investments and discriminatory treatment in politically challenging jurisdictions;
- flexible corporate law system;
- political and economic stability;
- excellent infrastructure and public transport, distribution facilities via Port of Rotterdam (largest seaport in Europe) and Amsterdam Schiphol Airport (the best intercontinental airport in Europe);
- highly skilled international orientated labour force: some 34% of the employees in business, trade and industry work for Dutch MNE's or Foreign MNE's with presence in The Netherlands (e.g. in brainport.nl Eindhoven).

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

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 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;
- exemption of dividend withholding tax upon outbound distribution of participation dividends in case of 5% of more shareholding or membership (Coop) by parent company in tax treaty states or EU/EEA in active (non-abusive) structures;
- 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) dividends 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;
- 7% Innovation (R&D) box regime for corporate tax purposes;
- tonnage tax regime for international maritime shipping companies;
- reverse charge rule regarding import VAT (Netherlands: VAT gateway to Europe);
- ATR and APA practice.

1.1 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 2020 rate of 16,5% on the first € 200,000 and at 25% on the excess. The CIT rates will be lowered from 16,5%-25% in 2021 to: 15% - 21,7%. Profits must be determined on the principles of sound business practice and in a consistent manner. Transfer of the legal seat generally triggers 'exit' CIT on hidden profit reserves etc., however in EU situations there are exit tax provisions e.g. delay of payment for 5 years, 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 CIT 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 Dutch PE's despite (non-resident) EU intermediary- or EU parent. Based on 2018 EU case law, Dutch fiscal unity regime will be amended for base erosion provision purposes (see below). For this purpose a public (internet) consultation was launched in 2019.

- **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 and later participation interest (in Dutch: 'deelnemingsrente') rules (see below A1 under 'base erosion provisions'), are abolished and replaced by the earning stripping measure.

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". Generally when the group (company) borrows (directly) from third parties, the escape of "business reason" exception can be invoked.

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

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 have been introduced in the years 2012 and 2013:
(A1) a participation debt 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) an acquisition holding debt 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 its own. Exceptions: [a] threshold for interest expenses below € 1 million [b] takeover debt: takeover price ratio of max. 3:2, in other words a 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%. As of 2017 specific abusive "debt-push down-" and "fiscal unity-" transactions are combated.

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 are 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.

Because of EU case law, 22 February 2018, changes of CIT group regime apply retroactively as of 25 October 2017, therefore base erosion provisions can also be invoked by tax authorities in case of application of fiscal unity regime. There is a transitional regime 2018 for interest up to € 100,000 per 12 months on special tax driven (base erosion) loans. Therefore generally these loans would be repaid in 2018.

The Netherlands implemented as of 2019 a general *earnings stripping* measure such as mentioned in OECD BEPS action point 4 (limiting base erosion). Interest deduction on loans is limited to 30% of EBITDA (earnings before interest, taxes, depreciation and amortization) without a 'group escape' however with a threshold of € 1 million of net interest per taxable entity. Operational lease is not regarded as a loan in this respect. Furthermore a fiscal unity is regarded as one entity. In specific cases this could lead to a split-up of the fiscal unity. The net interest expenses are defined as the difference between the amount of interest paid and the amount of interest received. An unlimited carry-forward applies for non-deductible, excess interest expenses, which will be issued in a decision by the tax authorities. There is an (EU proof) exemption available for long-term public infrastructure projects.

Pursuant to the introduction of the earnings stripping rule, the interest deduction restrictions for participation debt (A1) and acquisition holding debt (A2) are abolished as of 2019.

Banks and insurance companies do not fall under the earning stripping measure. Therefore as of 2020 interest deductions for these companies will be restricted if the minimum capital / equity is less than 8% of the accounting balance sheet total.

- **Innovation box / R&D / Wage tax reduction (WBSO)**

Under the innovation box regime, income derived from a self-developed patented intangible asset is subject to an effective tax rate of 7% (7/25 x 25% corporate income tax) if the patent contributes at least 30% to the profit derived from the use of the intangible asset. For smaller companies the 7% 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. Also software R&D can qualify.

There is a forfait 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 7% regime. Maximum advantage is no more than € 4,500 corporate tax ((25%-/-7%) x € 25,000). There is no threshold.

Based on OECD BEPS Action Plan the modified nexus approach is introduced as of 2017. This means that income from 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 assets that are not common and/or a novelty item, *developed in the Netherlands*. The last mentioned 'other' innovative intangible assets can only qualify – via WBSO / R&D certificate - for smaller companies (group turnover max. € 250 mio over 5 years – € 50 mio per year - and IP turnover max. € 37,5 mio over 5 years or € 7,5 mio per year). However for larger companies IP-assets that do not qualify, may, if certain conditions are met, apply the regime to that asset if it is 'related to' another IP asset for which the company does have an "entry ticket". IP-assets can be 'related to' each other: at a product level, at a process level or at an R&D level. Examples are described in a specific Innovation Box Decree.

The new Innovation box regime 2017 is approved by ECOFIN Code of Conduct Group which concluded that the new IP box regime does not constitute harmful tax competition (EU: no state aid).

All IP box rulings until 2016 generally end because of the new 'nexus' legislation, however IP box rulings of smaller companies could continue under transitional rules.

As of 2021 the effective tax rate of the innovation box will become 9%.

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 14% (2020) wage tax reduction on any excess. No maximum reduction applies.

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

- **Tonnage tax regime for international maritime shipping companies**

Upon request a special tax regime applies to international maritime shipping (management) companies which own the ships or charter a ship under a bareboat agreement. The exploitation must take place from the Netherlands, with at least one ship under EU/EEA flag, for international sea transport purposes. Non-transportation activities may not exceed 50% of the total annual profit. Furthermore seagoing vessels, which do not fly the flag of an EU/EEA country, may not exceed 75% of the tonnages of all qualifying vessels. If so, EU state aid rules are complied with and therefore the EC has granted approval for the Dutch Tonnage tax regime to be extended to 31 December 2028. The computation of taxable income for CIT purposes is based on the net tonnage per qualifying sea ship multiplied by a fixed amount per day per each 1.000 tonnes.

- **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 six future years (carry forward as of 2019).

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 later profits of years in which the company activities still consist of at least 90% group financing or of holding participations. Due to the introduction of an earnings stripping rule, the carry-forward restriction for holding and financial losses is abolished from 2019.
Liquidation losses regarding a liquidated subsidiary are under certain conditions also deductible.
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 PE losses can come deductible, as final liquidation losses). As of 2021 it is proposed (final) liquidation losses of participations smaller than 50% in non-EU subsidiaries or non-EU PEs are capped at a maximum loss of Eur 5 million. Furthermore the liquidation process needs to be finalized in the 3rd calendar year after ceasing activities, unless sound business reasons apply for this delay.

- **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.

1.2 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). Also excellent Dutch import VAT facilities for distribution activities and wage tax facilities for expats (30% ruling) are available. In this paragraph we will describe in short four Dutch tax planning tools.

- **Exemption of Dutch dividend withholding tax on participation dividends paid to EU/EEA and tax treaty partner states**

A participation or membership of 5% or more in a Dutch (holding) Subsidiary NV/BV or Holding Cooperative (Coop) qualifies for an exemption of Dutch dividend withholding tax upon distribution of dividends to parent companies in EU/EEA and tax treaty partner states, unless anti-abuse rules ('subjective' Principle Purpose Test and 'objective' Artificial structure test) apply. See Annex III for objective substance criteria regarding the foreign parent company, which however are not a 'safe harbour' anymore as of 2020, but still important for the division of the burden of proof. A special form has to be filed with the Dutch tax authorities to inform them about application of the Dutch dividend withholding tax exemption in case of participation dividends paid to above mentioned substantial shareholders. Such declaration should be filed within one month after the dividend was made available.

- **(Dutch) permanent establishment (PE) incl. R&D with 7% innovation box regime**

To start up business in Europe a Dutch branch office (PE) can be tax advantageous. Profits are taxed with corporate income tax, however profit distributions are generally not taxed with Dutch dividend withholding tax. Also the participation exemption can be applicable when the shares held are assets of the Dutch PE. In case of R&D activities the 7% innovation box regime can be applied for. When start-up losses have been settled, the branch office can be transferred tax free by way of business merger into a new Dutch subsidiary.
In case of a transparent entity e.g. (limited) partnership, all business partners have to be registered for (corporate) income tax purposes. This can be tax advantageous for foreign income tax partners (individuals) because of low first income tax brackets, who generally stay social insured in their home country.
As of 2020 the PE definition as contained in the relevant tax treaty will also apply for Dutch domestic tax purposes. For non-treaty situations, the definition used in the OECD Model treaty (2017) will be apllied.

- **The 30% wage tax ruling for expats hired from abroad incl. job-rotation within MNEs**

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 5 years as of 2019 (used to be 8 years). There is a transitional regime for existing cases for the years 2019 and 2020. As a (partial) non-resident tax payer, wealth tax (income tax box 3 except for Dutch real estate) will generally also not be applicable for 5 years. The compensation amounts to 30% of the gross salary, including the compensation, of minimum € 54,781 or 30/70 of the salary excluding the compensation of minimum € 38,347 (2020).

- **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 deductable 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 their Dutch VAT return (in stead of payment at customs and reclaim in VAT return), it can appoint a Dutch VAT representative for this purpose.

1.3 Absence of Dutch capital tax

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

1.4 Dividend withholding tax (DWHT of 15%)

A participation of 5% or more in a Dutch subsidiary BV or Coop qualifies for an exemption of 15% Dutch dividend withholding tax upon distribution of dividends to parent companies in NL, EU and tax treaty partner states. Similar rules apply for distributions to a Swiss, Iceland and Norwegian parent Co (EEA). The DWHT exemption does not apply where the shares in a Dutch resident BV/Coop are held for the principle purpose (or one of the principle purposes) of avoiding DWHT (subjective test) and there is an artificial structure put in place (objective 'substance' test is not met: see criteria regarding foreign parent company in Annex III. These substance criteria are not a safe harbour anymore as of 2020, however still relevant for the division of the burden of proof).
Where a Dutch Coop runs an active business with employees, it is still not taxable for dividend withholding tax purposes. As of 2012 only Coop Holdings (70% or more holding activities) became subject to dividend withholding tax.
A special form has to be filed with the tax authorities to inform them about application of the Dutch dividend withholding tax exemption in case of participation dividends paid to above mentioned substantial shareholders. Such declaration should be filed within one month after the dividend was made available.
Requests to obtain an exemption or refund of 15% Dutch dividend withholding tax on *portfolio dividends* generally have to be filed electronically. Requests for refunds must be filed within 3-5 years following the year of dividend payment.

1.5 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 generally 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 may 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 is 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 (ICP) return.
Foreign VAT refund claims can under conditions be filed digitally by EU VAT entrepreneurs in their home country.

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 'at 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 (see Annex II). As of 2019 also "labour costs of € 100,000 and disposal of office space for 24 months" requirements have to be met in case of application for an ATR or APA (Annex III). This could also be the case for international group service companies as of 2021.

As of 1 July 2019 the new substance requirements for ATR/APA requests are replaced by 'economic nexus' requirement with sufficient relevant operating activities. Furthermore, if the sole or decisive reason for performing the transactions is to save Dutch or foreign tax (abusive motive), a tax ruling will no longer be issued. The same applies if it relates to a transaction with a country mentioned on the Dutch blacklist of some 25 tax havens (low-taxed states and non-cooperative jurisdictions).

The substance- and risk-requirements from Annex II 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 finance-lease terms. In the corporate income tax return it has to be reported whether these conditions are met.
As of 1 July 2019 the issuance of all international tax rulings including APAs/ATRs is centralized with a new team, the International Tax Certainty Board (IFZ) and a standard format will be drafted for international tax rulings. This used to be done by the APA/ATR-team of the Rotterdam tax administration (large companies). For APA's a 'case-management plan' can be drawn up together with the taxpayer. Also a 'pre-filing meeting' is still possible. Finally 'small' companies can be supported by IFZ with 'comparables' from their TP databases.

Based on the standards as set out in the OECD BEPS Action Plan and based on EU Directive 2015/2376 framework, the Netherlands automatically exchanges information on new cross-border tax rulings. An anonymous summary of every new international tax ruling will be published as of July 2019.

The maximum term of international tax rulings is generally 5 years, however in exceptional cases e.g. long-term contracts, this can be extended to 10 years. The international tax ruling is laid down in a settlement agreement.

Finally Dutch government policy is to continue the tax ruling practice as a long term tool in Dutch investment policy and not to make any unilateral steps to decrease or stop the ATR / APA policy. Furthermore an expert committee is established in 2019 to make an inventory of measures that broaden the corporate tax base while also ensuring that the Netherlands remains attractive for head offices of MNE's.

2.1 Holding Companies

The main tax reasons for establishing a 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;
- exemption of Dutch dividend withholding tax on (outbound) participation dividend payments to EU/EER and tax treaty states in active (non-abusive) structures;
- no or relatively low withholding tax on dividend receivables (inbound) from EU/EEA and/or tax treaty countries;
- special tax treaties with the Curacao, Saint Martin and Aruba 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 harbours.

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). Furthermore the Netherlands introduced as of 2019 new CFC legislation to comply with the EU ATAD Directive. This CFC legislation applies if the following cumulative conditions are met by the controlled foreign company (1) more than 50% shareholding and (2) passive income e.g. interest, royalties and finance lease income, (3) taxed at a rate of less than 9% or resident in CFC-state on EU Blacklist of non-cooperative countries. The CFC rule will not apply if the basic minimum substance requirements (generally similar to the first six requirements of Annex II) are met by the CFC including the two additional new substance requirements 2019 of € 100,000 labour costs and 24 month disposal of office space (Annex III). In that case until 2019 there was deemed to be a 'substantial economic activity' in the CFC, as of 2020 this is not a 'safe harbour' anymore, however important for the division of the burden of proof.

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 participation. Consequently losses realised on the sale are not deductible.
If the value of 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.

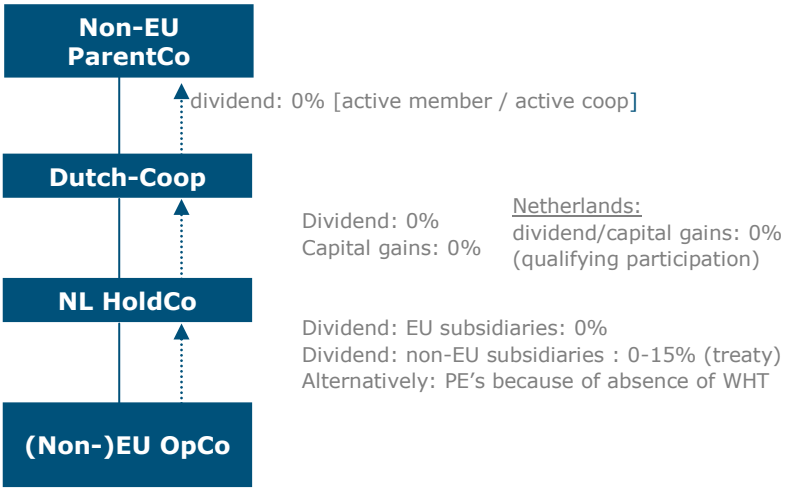
The (financing) costs associated with a shareholding are deductible. However because of participation interest rules as of 2013, the interest paid on (intercompany) loans may not or only partly be deductible from profits (see chapter one: base erosion provisions). As of 2019 these rules are replaced by the earning stripping rule.

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

If a holding company with sufficient substance (Annex II and III), 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.

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:



- **Dutch COOP used as international holding company**

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. 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, in the past profit

distributions by the COOP to its members were generally not subject to Dutch dividend WHT. As of 2012 anti-abuse rules are in place.

As of 2018 the anti-abuse rules are broad in line with the OECD rules (BEPS AP-6). Therefore the 'subjective' main purpose test is replaced by the principle purpose test (PPT). Furthermore the 'objective' artificial structure test is added with two new economic substance requirements: € 100,000 labor costs and 24 month office space. As of 2020 this additional substance is not a 'safe harbour' anymore and therefore can be challenged by the tax inspector.

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 foreign 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 by the member (see Annex III).

As of 2018 the difference between Cooperatives and NV/BV is abolished, by still granting Coop Holdings (70% or more holding and/or group finance activities) a dividend withholding tax exemption only 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/EEA or in a country with which the Netherlands has a tax treaty with a dividend article - holds an interest of 5% or more in the Coop and has sufficient substance (see Annex III).

Therefore as of 2018 profit distributions by a Holding Coop to foreign members that own 5% or more and are not resident in the EU/EEA or a tax treaty partner jurisdiction will generally be subject to 15% dividend withholding tax.

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

Based on domestic Dutch tax 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 additional economic substance rules apply i.e. € 100,000 labour costs and 24 months office space (see Annex III). As of 2020 these new substance requirements at the level of the substantial shareholder are not a 'safe harbour' anymore. Finally, in case of tax treaty application, this domestic legislation can be overruled, if the tax treaty mentions that income from a substantial interest is only taxable in the resident state of the foreign member of the COOP. As of 2020 it could be that these treaty benefits will be denied sooner because of introduction of the principle purpose test in Dutch tax treaties.

- **Foundation Administration Office [STAK]**

A type of foundation called 'Stichting Administratie Kantoor' (STAK) is often used for estate planning and privacy 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 if so, therefore not subject to Dutch corporate income tax.

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;
- 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. See basic minimum substance requirements mentioned in

Annex II, supplemented with new "€ 100,000 labour cost + 24 month office space" and economic nexus requirements for APA/ATR purposes in Annex III.

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 tax 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.

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);
- no or relatively low WHT rates on royalty receivables (inbound) from EU and tax treaty countries;
- Innovation box regime (see chapter 1.1);
- 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. See basic minimum substance requirements mentioned in Annex II, supplemented with new "€ 100,000 labour cost + 24 month office space" and economic nexus requirements for APA/ATR purposes in Annex III.

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 to do so. Consequently the source country may deny tax 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 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 transfer pricing information gathered should be included into 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.

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 in the OECD TP Guidelines 2017 (adopted by the Netherlands in their TP Decree 2018) a net cost plus mark up of 5% is possible for low value adding intra-group services e.g. helpdesk computer system not related to primary business process.

Foreign investors can contact the International Investors' Desk (**APBI or Greenfield team**) for preliminary consultation 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. 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. Under BEPS the tax position of source states is stronger than before. Double taxation on dividends, interest and royalties 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 in source state) in the tax treaties with Brazil, Pakistan, Philippines, Sri Lanka, Surinam and Zambia have no expiration date. In the new tax treaty with China 2015 the tax sparing credit facility is not mentioned anymore.
  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 (EEA).
As of 2016 is arranged for anti-abuse clauses (principle purpose test and artificial structure test) and exclusion of the participation exemption on deductible interest received on hybrid loans. 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") as part of the Kingdom of the Netherlands.

- **Merger and Split Directives**

Because of this directive, under certain (standard) 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. This is arranged for in the Netherlands in so called M&A Decrees.

- **Transfer Pricing Arbitration Treaty and Directive**

The arbitration treaty and directive 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. As of July 1, 2019 an EU Mutual Agreement Procedure (MAP) Directive is applicable for EU countries. Furthermore the Netherlands has implemented new fiscal arbitration legislation with the right for MNEs of (obligatory binding dispute resolution) arbitration and it wants to (re)negotiate this in their tax treaties.

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. The Dutch TP Decree in general adopts the OECD TP Guidelines for MNE and Tax Administration regarding transfer pricing methods and clarifies any indistinctness. In July 2017 the OECD published their TP Guidelines 2017 with amendments as set out in their BEPS Action Plan, which were adopted by the Netherlands in their TP Decree 2018.

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 € 50 million up to € 750 million during the prior year and additionally;
(2) *'country by country' reporting* of TP policy for MNE with consolidated revenue exceeding € 750 million, which is applicable on the Ultimate Parent Company or the Dutch (surrogate) Parent Entity (if CbC-reports are not received by automatic exchange of information with the country of the foreign Ultimate Parent);
(3) Up to € 50 million MNE consolidated turnover, the basic TP documentation requirements remain applicable (article 8b CIT Act).

The Master- and Local-file need to be on file before filing of the corporate tax return (as of 2016), the CbC report within 12 months after the end of the fiscal year (incl. notification of the tax authorities by web based tool).

This is the global trend in taxation: multilateral cooperation between tax authorities worldwide to provide a global picture of the operations of MNE's.

- **Savings Tax Directive (2003/2016)**

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.

- **Anti-Money Laundering Directive (2011/11/EU)**

The register for 'ultimate beneficial owners', also referred to as the UBO register, is the result of the 4th Anti-Money Laundering Directive and applies from 26 June 2017. Virtually almost all legal entities incorporated under Dutch law (no foreign entities, apart from trusts managed from the Netherlands) will be obliged to register their ultimate beneficial owners. In case of orphan structures without an 'economic' UBO, generally statutory directors need to be registered as 'fictitious' UBO. In the Netherlands the UBO register will be a public register operational as of half 2020. However to protect the privacy of the ultimate beneficial owners, a number of safeguards are attached to the register handled by the Dutch chamber of commerce..

- **Interest- and Royalty Directive (2003)**

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.

- **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 had to be exchanged by 1 January 2017 (in Dutch practice: 31 December 2017 because of volume) and under EU framework with a group turnover exceeding € 40 Million, had to 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 all EU members - against the erosion of tax bases in the internal EU market by means of financial instruments that yield a return on equity or debt and the shifting of profits out of the internal EU market; i.e. limitations to deductibility of interest rules (earnings stripping), exit taxation rules, a general anti-abuse rule, controlled foreign company (cfc) rules and rules to combat 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).
This is extended to third countries under ATAD-2, including non-taxation without inclusion and double tax credits. Because of revoking of the CV/BV Decree as of 2020 DWHT can be withheld on distributions to certain hybrid entities e.g. reverse hybrid CV's. For 'reversed hybrid entity' structures e.g. CV/BV structures with the US, deduction is excluded as of 2020 and income can be included as of 2022 in the Netherlands (CV considered non-transparent for Dutch CIT purposes). Under conditions are excluded investments as defined in EU UCITS/AIFM Directives.
All taxable companies in the Netherlands are obliged as of 2020 to include information in their administration which shows whether anti-hybrid mismatch provisions apply to a payment and if so, in which way.

- **Directive on Administrative Cooperation in the field of taxation (Mandatory Disclosure)**

The new 'Mandatory Disclosure' requirements for information on reportable potentially aggressive cross-border tax planning arrangements (concerning either more than one EU member-state or a member-state and third country) of intermediaries and relevant tax payers based on DAC-6, of which the first step is made available, ready for implementation or implemented between June 25, 2018 and July 1, 2020, should be filed at the Dutch tax authorities ultimately by August 31, 2020. Because of COVID-19 pandemic the reporting period and filing deadline are extended to January 1, 2021 and February 28, 2021.

- **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. See similar initiative in Pillar II from the OECD.

- **State Aid**

In the EU 'state aid' by way of preferential tax regimes is not allowed. Generally all Dutch tax rulings are in accordance with the OECD Transfer Pricing (TP) standards and therefore should not consist of illegal state aid. However decisions by European Commission regarding some rulings (StarBucks, Inter Ikea, Nike) are to the contrary. These EC decisions are appealed at the EU court and the EU Court of Justice. In September 2019 the General Court of the EU ruled that the StarBucks TP ruling did not contain illegal state aid. Because of new Dutch legislation as of February 2018 state aid can be taxed and reclaimed directly by means of additional tax assessment, within a period of 10 years after the state aid, upon decision by the EC. In 2019 the Dutch ruling practice is modified even further regarding content, process and transparency, to avoid (state aid) discussions in the future.

6 The Dutch Caribbean – Netherlands Relationship

Dutch group companies are often held by a Curacao holding company. The main reasons for this structure are:

- special tax treaty between The Netherlands and Curacao (Tax regulation Curacao – TRC);
- absence of domestic Curacao withholding tax on dividend-, interest- and royalty payments (outbound);
- absence of Dutch withholding tax on interest- and royalty receivables and absence or low dividend withholding tax on dividend receivables from The Netherlands (outbound);
- Curacao participation exemption exempts from CIT, dividends from and capital gains regarding shares in qualifying subsidiaries;
- absence of capital tax;
- ruling policy by 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 16,5% - 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 sufficient 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.

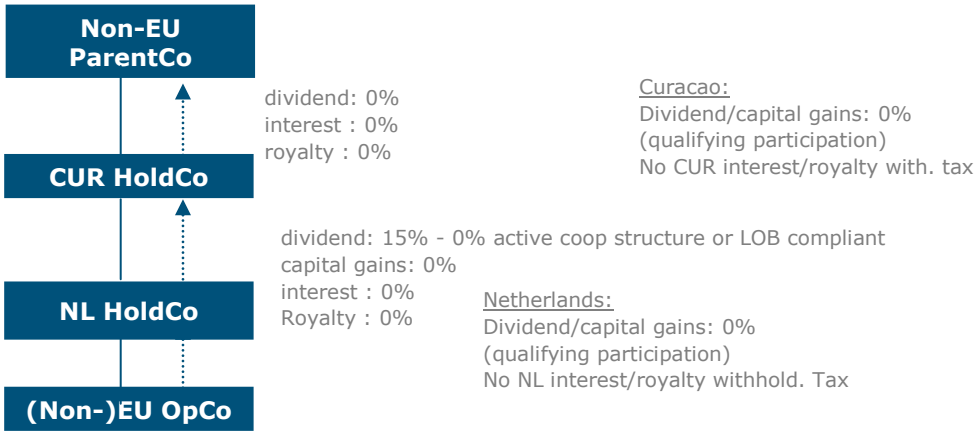
In a situation where the shareholders of the Curacao holding are resident in non-treaty states, generally the Dutch exemption of dividend withholding tax on the distribution of participation dividends by the Dutch subsidiary BV or Coop would only be applicable if the Curacao holding runs a business with sufficient substance i.e. in practice with € 100,000 labour costs and 24 months office space (objective test, Annex III). As of 2020 this substance is not a 'safe harbour' anymore.

Below an overview of the withholding tax rates.

Receiving Country:	Dutch Interest/royalties withholding tax %	Dutch dividend withholding tax %
Curacao	0	15-0
St. Martin	0	15-0
Aruba	0	15-7.5-5
Bonaire/Saba/Statia (C.N./BES)	0	15-5-0 (*)

(*) The Caribbean Netherlands (BES-islands) have the legal status of a public body of the European Netherlands. Participation dividends from European Netherlands (as of 5% 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. 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. Generally as of July 1, 2018 there is the possibility to opt for transparent status.

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. This practice is updated in 2018 based on the OECD BEPS project. The existing ruling policy regarding non-risk bearing intra-group finance- and licensing activities with generally taxation based on cost-plus approach is also updated.

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 participations of 5% or more 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).

The exempt company is replaced by the Curacao Investment company (CIC) taxable under zero-rate profit tax regime. CIC can also be used for IP box activities with sufficient nexus with Curacao (similar to Dutch innovation box regime). For smaller companies only a R&D statement is sufficient to give access to the IP box regime.

As of 2020 the 2% profit tax e-zone regime has been abolished, with a 2 year grandfathering provision.
In stead is introduced a 3% profit tax regime for qualifying activities with sufficient economic substance in Curacao: (i) aircraft, ship building, repair and maintenance (ii) business support activities e.g. call center, IT center for large groups (iii) warehousing (iv) services e.g. portfolio management, to unrelated investment institutions.

Because of the above, new economic substance requirements were published in 2019 with additional guidance.

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. As of July 1, 2018 an UBO-register was implemented.

Curacao is a BEPS Associate for the 'minimum standards' and party to the MLI 2017 (entered into force 1 July 2019). Aruba is member to join the Inclusive Framework for implementing measures against BEPS. Therefore TRK and TRC will be amended accordingly.

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 leasing
Registration of aircraft in internationally neutral jurisdiction Aruba under ICAO prefix P4 can be very efficient.

Furthermore leasing of aircraft by Dutch airlines by means of a subsidiary in the Caribbean Netherlands which falls under the scope of the Dutch corporate income tax and therefore gives access to some 100 Dutch tax treaties and Dutch corporate group regime, can also 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, Annex II and Annex III in case of APA/ATR, will apply. However 'big ticket' leases are generally structured between independent parties using 'orphan' (finance lease) 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 body called Caribbean Netherlands. This gives banks, financiers and owners/lessors extensive international (secured interests law) protection against (financial) problems of defaulting or insolvent airlines/operators, lessees of aircraft, aircraft engines and helicopters in these jurisdictions.
Application of CIME/AEP should be a sound business reason for financiers, lessors and (Dutch) airlines to finance their 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 generally 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. 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.

In 2012 the so called "BV-light" or "Flex-BV"-regime was 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 euro 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:

	Private (limited liability) company	Public limited (liability) Company	Cooperative, Guarantee company Commercial corp.	Commercial foundation
Preparation by	Management	Management	Management	Management
Period	Within 5 months after balance sheet date, extended by a period of max. 6 months		Within 6 months after balance sheet date, extended by a period of max. 5 months	
Adoption by	General meeting of shareholders	Board of Directors	General meeting	Statutory organ
Approval by	-	General meeting Of shareholders	-	-
Period	Within 2 months after preparation		Within 1 month after preparation	
Publication Requirement	Within 8 days after preparation / approval. At least within 12 months after Balance sheet date.			

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 (k = thousand and M = million):

	Micro	**Small**	**Medium-sized**	**Large**
Total assets	< € 350k	€ 350k - 6M	€ 6M - 20M	> € 20M
Net turnover	< € 700k	€ 700k - 12M	€ 12M - 40M	> € 40M
Average number of employees	< 10	10 - 50	50 - 250	> 250

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 (digitally as of publication year 2016) 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 a Dutch intermediary company does not need 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 or micro are required to be audited.

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 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 2011 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 including UBO 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).

Annexes

- **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 (DWHT) in The Netherlands is 15%. The Netherlands do not levy interest- and royalty withholding tax. 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 0% for participation dividends. The Dutch government has put this intent regarding participation dividends in tax treaty and EU/EEA (non-abusive) situations - in hard law as of 2018 (see par. 1.4 and Annex III).

Furthermore it was the intent of Dutch government to also reduce the DWHT to 0% on "portfolio dividends" as of 2020, unless the dividends are paid to tax havens or in abuse cases. However this intent has been abandoned in 2018 for political reasons.

As from 2021 however the Dutch government intends to introduce a conditional withholding tax on interest- and royalties in case of intra-group payments to blacklisted tax havens. As of 2024 this could also be the case for dividend distributions to these so called 'low tax jurisdictions'.

Finally from 2020 the Netherlands introduced multilaterally (MLI) or bilaterally a "principle purpose test" or updated "LOB test" in its tax treaties.

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.

	Dividends		**Interest**	**Royalties**
Overview of withholding tax rates under Dutch tax treaties:	Portfolio-dividends: companies/ individuals	Participation Dividends (25% or more participation):	Interest withholding tax	Royalty withholding tax
Domestic NL rates	15	0	0	0
Treaty rates:				
Albania	15	0/5	0/5/10	10
Algeria (6)	15	5	0/8	5/15
Argentina	15	10	0/12	3/5/10/15
Armenia	15	0/5	0/5	5
Aruba (5)	15	5/7.5	0	0
Australia	15	15	10	10
Austria	15	5(0)	0(0)	0/10(0)
Azerbaijan	10	5	0/10	5/10
Bangladesh (4)	15	10	7.5/10	10
Bahrein	10	0	0	0
Barbados	15	0	5	0/5
Belarus	15	0/5	5	3/5/10
Belgium	15	0/5(0)	0/10(0)	0(0)
Bonaire, Saba, Statia (2)	15	0/5	0	0
Bosnia-Herzegovina (1)	15	5	0	10
Brazil	15	15	10/15	15/25
Bulgaria	15	5(0)	0(0)	0(0)
Canada	15	5	0/10	0/10
China (P.R.C.)	10	0/5	10	6/10

	Dividends		Interest	Royalties
Croatia Curacao (5)	15 15	0(0) 0/15	0(0) 0	0(0) 0
Czech Rep.	10	0(0)	0(0)	5(0)
Denmark	15	0(0)	0(0)	0(0)
Egypt (4)	15	0	12	12
Estonia Ethiopia (4)	15 5/15	5(0) 5/10/15	0/10(0) 5	0/5/10(0) 5
Finland	15	0(0)	0(0)	0(0)
France	15	5(0)	0/10(0)	0(0)
Georgia (4)	15	0/5	0	0
Germany	10/15	5/10(0)	0(0)	0(0)
Ghana (4) Greece Hong Kong	10 15 10	5 5(0) 0	0/8 8/10(0) 0	8 5/7(0) 3
Hungary	15	5(0)	0(0)	0(0)
Iceland	15	0	0	0
India (4)	10/15	5/10/15	10/15	10/20
Indonesia (4) Iraq (6)	10/15	5/10	5/10	10
Ireland	15	0(0)	0(0)	0(0)
Israel	15	5	10/15	5/10
Italy	15	5/10(0)	10(0)	5(0)
Japan Jordan	10 15	0/5 0/5	0/10 5	0 10
Kazakhstan Kenya (4) (6)	15	0/5	0/10	10
Korea (Rep.) Kosovo (FYR) (1) (3)	15 15	10 5	10/15 0	10/15 10
Kuwait Kyrgyzstan (1) (4) (3)	10 15	0 15	0 0	5 0
Latvia	15	5(0)	0/10(0)	0/5/10(0)
Lithuania	15	5(0)	10(0)	0/5/10(0)
Luxembourg	15	2.5(0)	0/2.5/15(0)	0(0)
North Macedonia	15	0	0	0
Malawi (4)	10	10/5	0/10	0/5
Malaysia	15	0	10	8
Malta	15	5(0)	10(0)	0/10(0)
Mexico	15	0/5	0/5/10	10
Moldova (4)	15	0/5	0/5	2
Mongolia (4) (3) Montenegro (1)	15 15	0 5	0/10 0	0/5 10
Morocco (4)	25	10	10/25	10
Netherlands Antilles (5)	15	5/7.5/8.3/15	0	0
New Zealand	15	15	10	10
Nigeria (4)	15	12.5	12.5	12.5
Norway	15	0	0	0
Oman	10	0	0	8

	Dividends		Interest	Royalties
Pakistan (4) Panama	20 15	10 0	10/15/20 0/5	5/15 5
Philippines (4)	15	10	10/15	15
Poland	15	5(0)	0/5(0)	5(0)
Portugal Quatar	10 10	0(0) 0	10(0) 0	10(0) 5
Romania	15	0/5(0)	0(0)	0(0)
Russia Saudi Arabia Serbia (1)	15 10 15	5 5 5	0 5 0	0 7 10
Singapore	15	0	10	0
Slovak Republic	10	0(0)	0(0)	5(0)
Slovenia	15	5(0)	0/5(0)	5(0)
South Africa	0/10	0/5	0	0
Soviet Union (1)	15	15	0	0
Spain	15	5(0)	10(0)	6(0)
Sri Lanka (4) St. Maarten (5)	15 15	10 0	5/10 0	10 0
Surinam	20	7.5/15	5/10	5/10
Sweden	15	0(0)	0(0)	0(0)
Switzerland	15	0	0	0
Taiwan Tajikistan (1)	10 15	10 15	0/10 0	10 0
Thailand	25	5	10/25	5/15
Tunisia	20	0	7.5	7.5
Turkey Turkmenistan (1) (3)	20 15	5 15	10/15 0	10 0
Uganda (4)	5/15	0	0/10	10
Ukraine (4) UA.Emirates	15 10	0/5 0/5	0/2/10 0	0/10 0
United Kingdom	10/15	0(0)	0(0)	0(0)
United States	15	0/5	0	0
Uzbekistan (4)	15	5	10	10
Venezuela	10	0	0/5	5/7/10
Vietnam (4)	15	5/7	5/10	5/10/15
Former Yugoslav Rep.(1)	15	5	0	10
Zambia (4)	15	5	10	7.5
Zimbabwe (4)	20	10	10	10

If no tax treaty is available, the unilateral Dutch Decree on the avoidance of double taxation can be invoked.

(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) tax treaty is no longer effective;
(4) re-negotiations by the Netherlands with 23 developing countries for cooperation to combat treaty abuse, with LOB-test (publicly traded-, shareholder-, active-trade/business- and HQ- test) regarding dividend-, interest- and royalty-income.
(5) new tax treaty with Curacao in force as of 2016; St. Martin (in force 1-3-16) and Aruba will follow shortly.
(6) pending tax treaty negotiations with Kosovo, Chile, Iran, Andorra, Colombia, Ecuador, Mozambique, Senegal, Liechtenstein.

Dividends

The 'zero' between brackets (0) – as shown in the overview - is the 0% dividend withholding tax based on the EU Parent Subsidiary Directive (shareholding in subsidiary at least 10% or according to Dutch domestic law only 5% required). Similar domestic NL rules apply regarding EEA 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 as of 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 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 (AP-6; treaty abuse) 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* e.g. excellent infrastructure with distribution facilities via Rotterdam Seaport and Schiphol Airport, highly skilled international orientated labour force, some 100 Dutch Investment Protection Agreements (IPAs), flexible corporate law system, political and economic stability, the issue of tax 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 treaty benefits as a tax resident under the Dutch tax treaties.

Anti-abuse provisions in the relevant bilateral tax treaty or MLI 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 principle 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.

The Netherlands choose the PPT under AP-6, to be introduced in its tax treaties as of 2020.

Conduit arrangements without sufficient economic substance 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 with examples from the final report on AP-6.

The Netherlands signed in 2017 the multilateral instrument (MLI treaty from AP- 15) to implement the BEPS minimum standards (clarification of the purpose of a tax treaty, treaty abuse and improvement dispute resolution) on a multilateral basis. The MLI treaty will exist as a "covered Tax Agreement" next to the relevant bilateral tax treaty. Anti-abuse rules will only be effective if both treaty partners made the same choices. See the MLI Matching Database with reservations and notifications per country.

The Netherlands ratified the MLI on 29 March 2019, the MLI convention entered into force and be effective in respect of the Netherlands as of 2020. The Netherlands listed some 80 tax treaties to be brought within scope of the MLI. Based on the (provisional) choices of its treaty partners, the Netherlands expects some 50 of its tax treaties to be affected by the MLI. Tax treaties that will be affected as of 2020 include the treaty with Luxembourg, the UK, France and Japan. Countries will generally come up with an English synthesized text of their bilateral tax treaty including the

provisions of the MLI. The MLI will not have an impact on the tax treaty with the U.S. (not a party to the MLI), which US model treaty was already updated in 2017.

The OECD Model Tax Convention is already updated in 2017 and the UN Model Tax Convention in 2018 (e.g. article 29 regarding Entitlement to tax treaty Benefits with PPT rule and LOB rule).
Worldwide over 135 countries have joined the Inclusive Framework (IF) for implementing measures against BEPS, amounting more than 90% of the worldwide GDP (gross domestic product).

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, III of this memo). 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.

Furthermore as discussed, from 2021 the Dutch government intends to introduce a conditional withholding tax of 21,7% on interest- and royalties in case of intra-group payments to low-tax jurisdictions (i) with no profit tax or a statutory rate of less than 9% as published on a specified Dutch black list of some 20 countries, or (ii) included on the EU blacklist of non-cooperative countries and (iii) in abuse cases. Abuse is defined as artificial constructions aimed at avoiding the withholding tax. The tax payer may request an ATR on whether or not a situation constitutes abuse. The conditional withholding tax also applies if interest/royalties are not paid but accrued. Such amounts are calculated on an at arm's length basis. Also it is not relevant whether or not the paying entity has substance in the Netherlands. This is to prevent the Netherlands from being used as conduit through which capital flows to tax havens. It is expected that these payments from the Netherlands to these blacklisted tax havens will cease to exist. There will be a transitional regime of 3 years in case of a tax treaty with a low-tax jurisdiction. It could be that as of 2024 this conditional withholding tax also becomes applicable on dividend distributions to these blacklisted tax havens.

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. As of July 1, 2019 an EU MAP Directive became applicable for EU countries. Furthermore unilaterally a new Tax Arbitration Act and Decree on MAP-tiebreaker rule for dual resident companies applies. The latter Decree applies because of coming into force of the MLI as of 2020 by which residency of corporate entities will be settled based on MAP-tiebreaker rather than corporate-tiebreaker in the relevant tax treaty. In June 2020 Dutch Ministry of Finance published a new Decree on MAPs. Refusal of a MAP request is a decision admissible for objection and appeal at the administrative court.

Pillar One and Pillar Two: OECD BEPS project going forward
The digitalisation of the economy poses challenges for levying taxes on multinationals. Therefore the Netherlands under Pillar One supports the principle that under certain conditions corporate taxation is possible even if a company is active in a country without having a physical presence. Furthermore the Netherlands supports the Pillar Two initiative from the OECD to explore whether remaining risks of BEPS can be dealt with by measures that ensure multinational companies pay a minimum level of tax.

Annex II: Dutch list of basic minimum substance requirements

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

- 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- or lease- payments;
- the legal entity´s equity should be adequate in relation to the functions performed (taking into account the assets used and the risks assumed).

In a letter of June 15, 2020 the Dutch Ministry of Finance made clear that travel restrictions for board members during COVID-19 pandemic should not effect meeting the Dutch substance requirements.

Annex III: Dutch list of additional minimum substance requirements (BEPS)

Additional substance requirements:

(1) as of 2018, for foreign parent companies regarding (a) Dutch dividend withholding tax exemption for participation dividends and (b) absence of application of substantial shareholder rules (17-3-b CITA) and
(2) as of 2019, regarding (a) application of an ATR/APA by Dutch legal entities and (b) 'substantial economic activity' by a Controlled Foreign Company (CFC) and
(3) as of 2021 (proposal), for Dutch international group service companies regarding interest, royalty and lease payments (8c CITA):

- the legal entity must have an amount of (relevant) labour costs of at least € 100,000 annually;
- the legal entity must have an office building at its disposal for a period of at least 24 months;

For international tax ruling, APA/ATR application purposes the above new requirements are replaced as of 1 July 2019 by the new substance requirement that the legal entity must have sufficient 'economic nexus' with the Netherlands. I.e. the company submitting the ruling request must be a member of a group that carries on commercial operating activities in the Netherlands and commercial operating activities must be performed for the account and risk of that company for which at the group level there is sufficient relevant personnel in the Netherlands. Rulings issued before 1 July 2019 do not fall under the new policy.

Based on recent Danish EU case law in 2019 regarding the 'beneficial ownership' anti-abuse concept, new DWHT and CIT rules were proposed on 2020 Budget Day (17 September 2019). Therefore above mentioned (new) substance requirements will not be a 'safe harbour' anymore in these DWHT, substantial shareholder and CFC cases however still relevant for the division of the burden of proof. This would generally mean that as of 2020 the tax inspector is allowed to try to proof that the motives for an (e.g. linking intermediate holding company) arrangement are abusive, although the economic substance of € 100,000 labour costs and office space requirements are met.

Finally the Dutch tax authorities intend to bring 'strong cases' before the tax courts. This includes situations in which, for example, the € 100,000 labour costs are disproportionate to the amount of dividends, interest and royalties received and paid by the Dutch intermediary, or situations in which the intermediary very quickly passes on the dividends, interest and royalties received.

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