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Corporate Tax 2021

A practical cross-border insight into corporate tax law

17th Edition

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

There are 94 income tax treaties in force in the Netherlands. In addition, the Netherlands has signed several income tax treaties that are expected to enter into force in the future. Furthermore, the Netherlands is currently negotiating new income tax treaties and renegotiating a number of income tax treaties with existing tax treaty partners.

1.2 Do they generally follow the OECD Model Convention or another model?

Dutch income tax treaties generally follow the OECD Model Convention.

1.3 Has your jurisdiction signed the tax treaty MLI and deposited its instrument of ratification with the OECD?

The Netherlands signed the tax treaty MLI on 7 June 2017 and deposited its instrument of ratification with the OECD on 29 March 2019.

1.4 Do they generally incorporate anti-abuse rules?

The current tax treaty policy of the Netherlands is the incorporation of a 'Principle Purpose Test' in its tax treaties.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

The application of tax treaties overrides domestic Dutch law (irrespective of when the domestic law or tax treaty takes effect).

1.6 What is the test in domestic law for determining the residence of a company? Has the application of the test been modified in response to COVID-19?

For Dutch corporate income tax purposes, a Dutch company (e.g. a limited liability company, B.V.) is deemed to be a tax resident of the Netherlands by virtue of the fact that it is incorporated under Dutch law. Dutch tax law does therefore not require Dutch companies to meet any tests for determining the residence of a company. Even though in principle any Dutch company is deemed to be a Dutch tax resident insofar as it is incorporated under Dutch law, for some Dutch tax provisions and under (most) tax treaties the actual tax residency is decisive.

A company incorporated under non-Dutch law may be considered a Dutch tax resident if based on an examination of all relevant facts and circumstances it is determined that the company is resident of the Netherlands. The place of effective management is one of the most important factors to decide on actual tax residency. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made (the company's 'mind and management'). The residency of the directors is considered an important factor by the Dutch tax authorities. Another important factor to decide on actual tax residency of the company is the place where board decisions are (formally and materially) taken. In addition, the address where bank accounts of the company are kept, the country where the bookkeeping is done and the books are located, the office address, office space and the employment of personnel are relevant.

In response to the COVID-19 pandemic, in line with the OECD guidelines, the Dutch State Secretaries indicated that it would be unlikely that as a result of the COVID-19 measures a company's tax residency would change. When determining a company's place of effective management, all relevant facts and circumstance should be examined and not only those that pertain to an exceptional and temporary period such as the COVID-19 pandemic.

1.7 Is your jurisdiction's tax authority expected to revisit the status of dual resident companies in cases where the MLI changes the treaty "tiebreaker"?

It is expected that the Dutch tax authorities will revisit the status of dual resident companies in cases where the MLI changes the treaty 'tiebreaker'.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

The Netherlands levies a real estate transfer tax (RETT) on the transfer of Dutch real estate assets at a rate of 2% (for residential properties) and 6% (for other properties). From 1 January 2021, the RETT rates will change as indicated below.

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The general RETT rate will be increased from 6% to 8%. This rate will not only apply to the acquisition of non-residential properties, but from 1 January 2021 onwards also to residential properties which are not or only temporarily used as the main residential property of the acquirer.

The rate of 2% for the acquisition of residential properties will only apply to individuals acquiring the formal ownership of a residential property which is used as main residential property.

A temporal conditional exemption from RETT will be introduced for 'starters', which would apply in the period 1 January 2021 up to and including 31 December 2025. The exemption is available for (i) individuals aged 18 to 35, (ii) whom acquire a residential property, and (iii) use it as their main property, and (iv) whom did not apply the exemption in the past.

2.2 Do you have Value Added Tax (VAT), or a similar tax? If so, at what rate or rates? Please note any rate reduction in response to COVID-19.

The Netherlands levies Value Added Tax (VAT) on the supply of goods and services as part of the domestic implementation of the EU VAT Directive (Directive 2006/112/EC). The current Dutch VAT system, therefore, is comparable to VAT systems of other EU Member States, though the Netherlands uses certain optional measures to facilitate trading. In the Netherlands, the following VAT rates apply to supplies of goods and services: general rate: 21%; reduced rate: 9%; and zero rate: (0%).

The Dutch VAT rates have not been changed in response to the COVID-19 pandemic.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

Certain transactions are treated as VAT exempt. Examples of such transactions are health care, education, financial services, insurance services, child day care, transfer or lease of certain real estate assets, funeral services, deposit and management of portfolio investments.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

A VAT entrepreneur may generally recover input VAT charged on goods provided and services rendered to him based on a proper invoice. There are certain exceptions such as VAT charged on food and beverages and VAT charged in connection with exempt transactions.

2.5 Does your jurisdiction permit VAT grouping and, if so, is it "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

A Dutch VAT group can be created by two or more persons established within a EU Member State, who, while legally independent, are closely bound to each other by (i) financial ties (i.e. more than 50% shareholding), (ii) organisational ties (i.e. central management), and (iii) economic ties (i.e. same or related activities or suppliers). In that case they can opt to be treated as one VAT entrepreneur. Transactions between the members of a VAT group are not subject to VAT. The right to deduct input VAT is based on the activities of the VAT group as a whole. The VAT group regime applies only if each member of the VAT group qualifies as an entrepreneur for VAT purposes.

According to the Dutch Ministry of Finance, the Dutch VAT group regime should not be considered 'establishment only', such as that applied by Sweden in the *Skandia* case.

2.6 Are there any other transaction taxes payable by companies?

The Netherlands does not levy any other transaction taxes except for VAT and real estate transfer tax.

2.7 Are there any other indirect taxes of which we should be aware?

Besides VAT, the main other indirect taxes levied by the Netherlands are excise duties on certain categories of products (e.g. alcoholic beverages, tobacco and mineral oils), consumption taxes (e.g. on soft drinks, fruit juices and water) and import duties on various products imported from outside the EU.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

The Netherlands levies generally 15% Dutch dividend withholding tax in respect of dividend distributions (and other payments treated as dividend for Dutch tax purposes) paid by Dutch tax-resident companies (or companies deemed to be tax residents).

An exemption applies to dividends distributed to corporate shareholders who own a share interest of at least 5% in the relevant Dutch tax-resident company if, in short, the corporate shareholder is a tax resident of the EU or a jurisdiction with which the Netherlands has concluded a tax treaty, is the beneficial owner of the dividend, or if it is not a hybrid transaction and the subjective and objective tests are both met. The subjective test is met if – in short – a corporate structure was set up to avoid an individual's liability to pay dividend tax. The objective test is met if the corporate structure is deemed part of an artificial arrangement or transaction.

Application of the extensive tax treaty network or EU directives may result in a reduction or refund of Dutch dividend withholding tax.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Dutch Parliament has adopted a law introducing a withholding tax on interest and royalty payments which will apply from 1 January 2021 onwards. The applicable rate will be 25%. The withholding tax would apply to intra-group interest and royalty payments by Dutch resident companies to related entities either residing in jurisdictions with no or low statutory tax rates (most likely less than 9%), in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions or in abusive situations.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Reference is made to our answer to question 3.2.

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3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

As part of the implementation of the Anti-Tax Avoidance Directive 1, as of 1 January 2019 the Dutch earning stripping rules limit the deduction of excessive interest expenses related to intra-group and third-party payables for Dutch corporate income tax purposes.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Under the Dutch earning stripping rules, the starting point is to determine the Dutch taxpayers' so-called interest expense excess, which is the amount by which the Dutch taxpayers' tax-deductible interest expenses exceed their taxable interest income. The deductibility of the interest expense excess is limited to 30% of the taxpayers' EBITDA (carving out tax-exempt income) or a safe harbour threshold of EUR 1 million, whichever is higher. Interest disallowed under the earnings stripping rule can be carried forward to later years without any time limitations.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The Dutch earning stripping rules apply to interest payments to both intra-group companies and third parties.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident, for example pursuant to BEPS Action 4?

Besides the earning stripping rules, Dutch corporate income tax law includes several rules based on which the deduction of interest can be denied.

Under the Dutch anti-tax base erosion rules, the deduction of interest expenses (including currency results and other costs) is limited to related party loans that have been used to finance: profit distribution or repayment of capital to related parties; capital contributions to related parties; or the acquisition or increase of share interests in entities that are or become related parties. There are, however, exceptions under which the interest deduction limitation rule does not apply (e.g., if the loan and the transaction are based primarily on business reasons).

In addition, there is a rule limiting the deduction of interest and value fluctuations of low or no interest-bearing loans. Under these rules, interest expenses and fluctuations in the value of loans are not deductible if (i) a loan is a related party loan, that (ii) does not have a fixed repayment date of over 10 year after contracting the loan, while (iii) legally or actually no interest has been charged or the interest is to a considerable extent lower than the economic value that independent parties would have agreed upon.

Finally, Dutch tax law limits the deduction of interest and value fluctuations of loans if the loan would have the characteristics of equity for Dutch tax purposes. This can either be a sham loan, a profit-depended loan or a participation loan (i.e. the payment of interest depends on whether the creditor is in a profit-making position, the loan is subordinated to all other creditors and the loan has no maturity date or a maturity period of 50 years or more and is therefore only collectable in case of bankruptcy).

3.8 Is there any withholding tax on property rental payments made to non-residents?

The Netherlands does not currently levy a withholding tax on property rental payments. However, non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources including rental payments derived from Dutch real estate.

3.9 Does your jurisdiction have transfer pricing rules? Is their application expected to be materially affected by COVID-19?

For Dutch tax purposes, transactions between affiliated entities must be performed under the same terms and conditions as would be agreed between non-affiliated entities under similar circumstances (the so-called 'arm's length principle'). If the terms and conditions of an affiliated party transaction are not at arm's length, the transaction is taxed as if they had been.

The Dutch transfer pricing rules have not been changed in response to the COVID-19 pandemic.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

In 2020, the Dutch CIT rate is 16.5% for taxable profits up to and including EUR 200,000 and 25% for taxable profits exceeding this amount. Please note that there have been amendments to the envisaged changes of the Dutch CIT rate in the coming years.

Now, it is envisaged that the CIT rate of the lower bracket will be reduced to 15% for taxable profits up to and including EUR 200,000 in 2021. It is expected that the threshold for the 15% rate will be increased to EUR 245,000 on 1 January 2021 and to EUR 395,000 on 1 January 2022. The 25% rate for taxable profits exceeding this amount remains unchanged.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

The profit for accounting purposes may differ from the profit for Dutch tax purposes. The profit for Dutch tax purposes is based on the principle of 'sound business practice', which originates from Dutch case law. After the profit for Dutch tax purposes is determined, there may be certain other adjustments to determine the actual taxable amount based on the provisions of the Dutch Corporate Income Tax Act.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments between the profit for Dutch tax purposes and the actual taxable amount based on the Dutch Corporate Income Tax Act include the treatment of income from subsidiaries, deductibility of interest, depreciation, transactions within a tax group (fiscal unity) deduction of certain costs and hybrid payments.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Companies can file a request to form a 'fiscal unity' for Dutch corporate income tax purposes if certain conditions are met.

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A fiscal unity may file a consolidated corporate income tax return, and the companies included in the fiscal unity are taxed on a consolidated basis as if they were just one company. As a result, transactions between companies belonging to the fiscal unity are, in principle, ignored and not subject to taxation on profits or gains. However, under the application of certain anti-abuse rules (e.g., for the anti-base erosion rules), transactions between entities within a fiscal unity are taken into account. There are certain other anti-abuse rules, which for example can be triggered by the formation or dissolution of a fiscal unity. Companies belonging to a fiscal unity are jointly and severally liable for payments of corporate income tax over the period of the fiscal unity.

The Dutch fiscal unity rules only apply to Dutch companies and Dutch permanent establishments of non-Dutch companies and therefore do not allow for relief for losses of overseas subsidiaries.

4.5 Do tax losses survive a change of ownership?

There are certain anti-abuse rules based on which the deduction of tax losses can be denied if the (ultimate) shareholders of a Dutch company have been changed for at least 30% compared with the oldest loss year. Certain exceptions apply; for instance, if the activities during the loss year did not primarily consist of passive portfolio activities and it is not anticipated to reduce such activities of the taxpayer considerably in the next three years.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

This is not applicable.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

Dutch Parliament has adopted a law introducing a withholding tax on interest and royalty payments, which will apply from 1 January 2021 onwards. The applicable rate will be 25%. The withholding tax would apply to intra-group interest and royalty payments by Dutch resident companies to related entities either residing in jurisdictions with no or low statutory tax rates (most likely less than 9%), in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions or in abusive situations.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

This is not applicable.

5.2 Is there a participation exemption for capital gains?

The Netherlands has one of the best holding company regimes in the world. The Dutch participation exemption provides for a full exemption of income (e.g. dividends, capital gains, liquidation proceeds) derived from share interests in qualifying participations. The conditions for the application of the Dutch participation exemption are relatively easy to meet compared to similar regimes in other jurisdictions (e.g. no minimum holding period, low minimum share interest of 5% or more).

5.3 Is there any special relief for reinvestment?

A taxpayer can roll over capital gains realised in connection with the sale of a business asset under the application of the reinvestment reserve. Certain conditions apply such as the condition that the taxpayer should reinvest in an asset with the same function if the assets are not depreciated or have a depreciation term of more than 10 years, the reinvestment term is three years and on the condition that the book value of the new asset is not lower than the disposed asset.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, which may include income derived from shareholdings of at least 5% in Dutch companies, if they cannot pass either the subjective or objective test. The subjective test decides whether non-resident corporate shareholders hold shares in Dutch taxpayers with the main purpose or one of the main purposes of avoiding Dutch personal income tax by another. The objective test decides whether the situation qualifies as an artificial arrangement. The rules are only applicable to income directly received from Dutch shareholdings.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

This is not applicable.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

Distributions by local Dutch subsidiaries are in principle subject to Dutch dividend withholding tax. Distributions by a local branch of a non-resident company are not subject to a branch profit tax.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

For Dutch corporate income tax purposes, the allocation of the taxable profit of a local Dutch branch should be based on an allocation of risks and functions between the head office and the branch.

6.4 Would a branch benefit from double tax relief in its jurisdiction?

A Dutch branch is generally entitled to relief from double taxation under the application of the domestic rules but is in most cases not entitled to apply to Dutch double tax treaties.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Distributions by a local Dutch branch of a non-resident company are not subject to a branch profit tax.

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7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Profits received by a Dutch company from a non-Dutch branch should be exempt for Dutch tax purposes insofar as the Dutch object exemption applies.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Reference is made to our answer to question 5.2.

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Based on the implementation of the Anti-Tax Avoidance Directive 1, controlled foreign company (CFC) rules apply as from 1 January 2019. Under the CFC rules, undistributed 'tainted' (passive) income derived from direct or indirect subsidiaries or permanent establishments established in jurisdictions with no or low statutory tax rates (i.e. less than 9%) or in jurisdictions that are on the EU blacklist of non-cooperative jurisdictions included in a blacklist issued by the Dutch Ministry of Finance, is annually included in the taxable basis of the Dutch taxpayer. Only interests of 50% of Dutch taxpayers together with related companies are targeted. The CFC rules generally do not apply if subsidiaries or permanent establishments have a certain level of substance (including office space and payroll expenses of generally at least EUR 100,000). Not meeting the substance requirements means that there is a presumption of an abusive situation, unless the relevant taxpayer reasonably demonstrates to the tax authorities that there is no abusive situation. Even if the foreign subsidiary or permanent establishment has substantial economic activity, the Dutch tax authorities may demonstrate that this is only to apply the exception while an abusive situation exists.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including Dutch real estate assets. In addition, the Netherlands levies a real estate transfer tax. Reference is made to our answer to question 2.1.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

The transfer of indirect interests in Dutch companies should not be subject to Dutch corporate income tax. However, the transfer of a company may be subject to real estate transfer tax if the assets have consisted of 50% or more of real property and at the same time at least 30% of real estate located in the Netherlands provided that its objects are, or the actual activities consist of acquiring, alienating or developing, real estate.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

The Netherlands has a special tax regime for so-called Financial Investment Institutions (in Dutch: *Fiscale beleggingsinstellingen*) based on which qualifying entities investing directly or indirectly in Dutch real estate are subject to Dutch corporate income tax at a rate of 0%.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Dutch tax law includes the uncodified anti-avoidance rule called *fraus legis*. Under the application of *fraus legis*, transactions can be eliminated for Dutch tax purposes or replaced by other transactions that fall within the scope of relevant legal provisions. *Fraus legis* can be applied if the Dutch tax authorities can prove that (i) the sole or predominant motive for a transaction is tax avoidance, and (ii) the envisaged tax consequences of a transaction would conflict with the purposes and rationale of the relevant law.

9.2 Is there a requirement to make special disclosure of avoidance schemes or transactions that meet hallmarks associated with cross-border tax planning?

Dutch Parliament adopted a law implementing the EU Directive regarding Mandatory Disclosure 2 (commonly known as the DAC6). Based on this law, service providers, or in the absence thereof, taxpayers, should disclose certain reportable tax arrangements. The start date of the DAC6 reporting is 1 January 2021. The rules will apply retroactively from 25 June 2018 onwards.

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

The Netherlands has no rules targeting promotors, enablers or facilitators of tax avoidance besides the proposed DAC6 rules described in question 9.2 above. However, there are rules based on which persons cooperating with tax evasion can be fined.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

Yes. The Netherlands has a mechanism based on which taxpayers and the tax authorities can cooperate together on the basis of mutual trust (so-called horizontal monitoring). The mechanism only provides procedural benefits for the taxpayer.

10 BEPS and Tax Competition

10.1 Has your jurisdiction implemented the OECD's recommendations that came out of the BEPS project?

In response to the OECS project targeting BEPS, the Netherlands has implemented the Anti-Tax Avoidance Directive 1 based on which the earning stripping rules and controlled foreign company

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(CFC) legislation were introduced, and the rules regarding exit taxation were amended. Furthermore, the MLI was ratified (reference is made to our answer to question 10.2). Besides these measures, the Ministry of Finance implemented the first part of the Anti-Tax Avoidance Directive 2 on 1 January 2020 and amended the conditions of the Dutch corporate income tax rules for non-resident corporate shareholders in Dutch companies and the conditions of the Dutch dividend withholding tax exemption on 1 January 2020 and will introduce a conditional withholding tax on interest and royalty payments on 1 January 2021.

10.2 Has your jurisdiction adopted any legislation to tackle BEPS which goes beyond the OECD's recommendations?

As mentioned in our answer to question 10.1, the Netherlands will introduce a conditional withholding tax on interest and royalty payments on 1 January 2021.

10.3 Does your jurisdiction support information obtained under Country-by-Country Reporting (CBCR) being made available to the public?

Based on Dutch law, information obtained under Country-by-Country Reporting (CBCR) is not made available to the public. However, the Dutch government supports this concept in discussions with other EU Member States.

10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

In their annual corporate income tax returns, Dutch taxpayers can apply an 'innovation box regime' to qualifying profits derived from benefits from certain self-developed intangible fixed assets. Under the innovation box regime, only 9/25 of the profits are included in the tax base of a taxpayer, resulting in an effective tax rate of 9%.

11 Taxing the Digital Economy

11.1 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

The Netherlands has not taken unilateral action to tax digital activities nor expand the tax base to capture digital presence. The Dutch government currently takes the position that the taxation of digital activities should be based on international consensus to be reached by the OECD, the 'inclusive framework' and the EU.

11.2 Does your jurisdiction favour any of the G20/OECD's "Pillar One" options (user participation, marketing intangibles or significant economic presence)?

The Dutch Government supports the international discussions of the G20/OECD to develop a consensus on the taxation of the digital economy. The Dutch Government takes an open approach to the implementation of the Pillar One options in order to reach a consensus on this topic with its partners.

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