

BUREN

LEGAL | TAX | NOTARY

Substance and Covid-19

May 2020

Covid-19 and place of effective management and control

All levels of substance requirements have in common that important board decisions are made in the jurisdiction of residence during physical board meetings

- OECD Guidance 3 April : *extra ordinary and temporary circumstances should not result in other tax residence jurisdiction*
- Netherlands
 - emergency law : electronic AGM / extend filing and reporting deadlines
 - no guidance Dutch tax administration
- Luxembourg
 - 20 March : Grand Ducal regulation on holding of board meetings and shareholders' meetings without physical meetings
 - 21 April: Bill of law regarding the extension of the measures provided for in the above regulation for board and shareholders' meetings
 - 27 March : Bill of law aiming to extend deadlines to approve and file annual accounts

Substance rules in the Netherlands

Substance tests apply in different situations. Mechanical application ?

- Non resident shareholder in case of a dividend distribution by a Dutch resident distributing entity when a full withholding tax exemption is being applied.
- A Dutch resident corporate income taxpayer insofar it is a qualifying financial service company. Holding companies out of scope for now.
- Application for ATR/APA
- Non resident subsidiary when assessing a CFC within the meaning of ATAD I
- Non resident related lenders and licensors as from 1 January 2021 following introduction of a withholding tax (**21.7% !**) on interest- and royalty payments in low-tax or abusive situations.

Substance requirements include:

- At least 50% of directors with decision making authority are Dutch tax resident
- Important board decisions are taken in the Netherlands
- payroll cost requirement of EUR 100,000
- availability of adequate office space for at least 24 months that should be functional to the role and activities

Non-compliance with substance rules : consequences

- Exchange of information by DTA
- Not possible to obtain certainty in advance
- No Dutch dividend withholding tax exemption
- Application of CFC rules
- Denial tax treaty benefits if the MLI applies
- Absence of tax credit foreign withholding taxes

Substance rules in Luxembourg

Luxembourg tax law does not provide specific substance requirements. However, it is advisable to properly document that the important business decisions of a Luxembourg company are taken in Luxembourg (and not elsewhere) in order to avoid discussions on the tax residency of the company.

This normally implies that foreign shareholders / board members of a Luxembourg company should travel to Luxembourg in order to discuss and take the important business decisions of the company. Considering that travelling to Luxembourg may not be possible during the Covid-19 crisis, we hope that the latter will be taken into account if questions on the tax residency of a Luxembourg company would arise.

Contact information



Cees-Frans Greeven
Partner
E c.greeven@burenlegal.com
T +31 20 333 8390
M +31 6 218 12 619



David Córdova
Partner
E d.cordova@burenlegal.com
T +35 26 4409 1922
M +352 621 797 462

Offices



Amsterdam



Beijing



Luxembourg



Shanghai



The Hague

BUREN

LEGAL | TAX

burenlegal.com

Amsterdam

World Trade Center
Tower C - level 14
Strawinskylaan 1441
1077 XX Amsterdam
The Netherlands

PO Box 78058
1070 LP Amsterdam
The Netherlands

T +31 (0)20 333 8390
F +31 (0)20 333 8399

Beijing

ZhongYu Plaza, Room 1602
No. 6, North Gongti Road
ChaoYang District
100027 Beijing
The People's Republic of China

T +86 (10) 8 5235 780
F +86 (10) 8 5235 770

The Hague

Johan de Wittlaan 15
2517 JR The Hague
The Netherlands

PO Box 18511
2502 EM The Hague
The Netherlands

T +31 (0)70 318 4200
F +31 (0)70 356 1340

Luxembourg

Rue Goethe 5
L-1637 Luxembourg
Luxembourg

T +352 (0)2644 0919
F +352 (0)2717 7700

Shanghai

Room 2505B, ICC-Tower
No. 3000, North Zhongshan
Road
200063 Shanghai
The People's Republic of China

T +86 (21) 6 1730 388
F +86 (21) 6 1730 386