

SUMMARY OF THE NETHERLANDS TAX REGIME

2013

RELEVANT FEATURES FOR FOREIGN INVESTORS

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February 2013

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GENERAL

Profits of companies and certain other legal entities resident in the Netherlands with a capital divided into shares are subject to corporate income tax, irrespective whether or not such companies have been incorporated under the laws of The Netherlands. The corporate income tax rate is 25% (20% over the first € 200,000 of taxable profit). Non resident companies are taxable for Netherlands source income only. Besides corporate income tax, companies are not subject to any significant taxes on income (except certain companies involved in the exploration or exploitation of oil & gas on the Dutch part of the continental shelf).

The Netherlands do not levy withholding taxes on interest (except where the relevant loan, based on certain features of equity, is reclassified as equity) and on royalties. Profit distributions by a company are subject to dividend withholding tax at the (domestic) rate of 15%; under various tax treaties this rate is reduced substantially. For qualifying EU parent companies a 5% minimum shareholding will be sufficient to benefit from a full exemption of the dividend withholding tax (instead of the current 10% - threshold of the EU Parent Subsidiary Directive). Tax exempt EU and EEA resident funds, which are comparable with Dutch tax exempt funds (e.g. pension funds) are entitled to a refund of Dutch dividend withholding tax. As from 1 January 2012, tax exempt funds which are resident outside the EU and EEA are also entitled to a refund of Dutch dividend withholding tax on portfolio dividends, under the condition that an arrangement applies between the Netherlands and the residence state which provides for the exchange of information.

Company profits are calculated in Euros. If another currency than the Euro is to be considered as the functional currency for the company, it is permitted to calculate the taxable profit in that functional currency, provided a functional currency tax ruling is obtained.

Profits and losses are determined under the assumption that the company is dealing with related parties on an arm's length basis (i.e. under third party conditions). Adjustments to taxable profits can be made if the tax payer is unable to provide sufficient transfer pricing documentation. All tax payers involved in intercompany transactions are required by law to maintain adequate transfer pricing documentation in relation to their intercompany transactions.

Generally, no distinction is made between different types of income such as trading profits, capital gains, passive income etc. A few exceptions apply:

- ❖ An exemption applies to qualifying shareholdings (see 'the participation exemption').
- ❖ Income qualifying for the so-called innovation box is subject to an effective tax rate of 5% (see the innovation box).
- ❖ Tonnage tax (special regime for shipping & related activities; see 'Shipping')
- ❖ Losses incurred by a company that only performs holding activities and no other activities can only be offset only against profits of a similar nature.

The recognition of annual income and the valuation of balance sheet items should be in conformity with "sound business practice", a doctrine developed in case law. The "sound business practice" concept is generally in line with internationally accepted accounting principles. Consequently, no fixed rules for depreciation of fixed assets and the calculation of provisions exist, although minimum depreciation periods and other restrictions may apply. The main principle of the "sound business practice" is the historical cost convention, although a number of facilities are available aimed at avoiding taxation of inflation profits, such as roll-over facilities for capital gains and special provisions for the valuation of stocks. Furthermore, certain elements of the total income may be tax exempt. Most well known is the participation exemption for income and capital gains derived from qualifying subsidiaries (see the participation exemption).

Another important facility of the Netherlands corporate income tax system is the possibility to opt, under certain conditions, for a consolidated tax treatment for Netherlands group companies (see Consolidated Tax Treatment).

Foreign source income may be *exempt* from Dutch corporate income tax on the basis of either double tax treaties or the Dutch unilateral regulations for avoidance of double taxation (see Unilateral Regulations of Double Taxation). Alternatively, foreign (withholding) tax on foreign source income may be credited against the Dutch tax liability on such income.

IMPORTANT ITEMS

THE PARTICIPATION EXEMPTION

Under the participation exemption, proceeds from qualifying subsidiaries, including dividends and both realised and unrealised capital gains, are excluded from the taxable profit for corporate income tax purposes. Costs of acquisition and disposition of participations are also covered by the exemption and therefore are non-deductible.

Accordingly, capital losses on the disposition of participations are not deductible. An important exception is made for losses in connection with the liquidation of a participation (i.e. liquidation losses may be deductible), provided certain requirements are met.

A shareholding is a participation if the taxpayer owns at least 5% of the *nominal issued and paid up capital* of a Dutch or foreign company with a capital divided into shares. Shareholdings of less than 5% do not qualify.

As a general rule, the participation exemption applies if a participation is not held as a passive investment by the tax payer (“motive test”). A participation is held as a passive investment if it is held for the purpose of earning a return on investment which can be expected from ordinary asset management. If the motive test can not be met, the participation exemption may still apply if the participation is a “qualifying participation”, which is the case if the ‘subject-to-tax test’ is met and/or the ‘asset test’ is met.

Subject to tax test

The subject to tax test effectively requires a general comparison of the profits tax regime of the country where the participation is established with the Dutch corporate income tax regime. The subject to tax test is met if:

- The statutory rate of the profits tax is at least 10% and there are no significant differences in tax base, or
- The statutory rate of the profits tax is at least 10% and there are significant differences in tax base but these do not result in an effective tax burden of less than 10%, or
- The statutory rate of the profits tax is less than 10% but it is probable that the effective tax burden is at least 10%.

Asset Test

The asset test is met if the aggregated assets of the participation do not consist, for 50% or more of *low taxed* free passive assets. In principle, free passive assets are all assets which are not necessary for carrying on the business of the participation. Examples of free passive assets are excess cash and group receivables. However, under certain conditions even excess cash and group receivables may not be treated as free passive assets. The following assets are deemed not to be low taxed passive assets:

- Assets the income of which is subject to levy of profits tax which is considered “real” by Dutch standards (reference is made to the subject to tax test).
- Real estate (including rights which relate directly or indirectly to real estate).
- Low taxed passive assets which do not form more than 30% of the total assets of the participation owning the low taxed passive assets.
- Group receivables or receivables from providing assets intra group, provided that the participation owning such receivables meets the strict conditions for “active group financing companies” or provided that such receivables have been externally financed (legally and in substance) for at least 90%.

Where the participation is held as a passive investment or is not a qualifying participation, double taxation relief is granted by way of a 5% deemed tax credit (irrespective of the underlying tax rate). In relation to EU & EEA resident passive investment participations, the underlying rate of tax may be credited at the request of the taxpayer, instead of the 5% deemed tax credit.

CONSOLIDATED TAX TREATMENT (FISCAL UNITY)

The fiscal unity rules have been laid down in the Corporate Tax Act 1969 (*Wet op de vennootschapsbelasting 1969*) and tax regulations.

A fiscal unity can be formed by and between Netherlands resident companies, and (under certain circumstances) – by and between – Netherlands resident companies and non resident entities carrying on (part of) their enterprise through a Netherlands branch. The main conditions for forming a fiscal unity include the following:

1. Share ownership requirement

- The fiscal unity parent company or other fiscal unity member companies will need to own, legally and economically, at least 95% of the issued and paid up share capital, giving right to at least 95% of the voting power, at least 95% of the profit, and at least 95% of the capital, of the fiscal unity subsidiary;

2. Book year requirement

- The fiscal unity member companies need to have the same book year;

3. Same regime requirement

- The fiscal unity member companies need to be subject to the same tax rules (e.g. exempted companies and normally taxable companies cannot be joined in a fiscal unity);

4. Corporate form requirement

- In addition to NVs and BVs (and similar Netherlands resident non-Netherlands entities) certain other entities may form part of a fiscal unity as parent company.

A fiscal unity is in fact a fiscal consolidation, resulting in all participating companies being treated as a single taxpayer for corporate income tax purposes. One of the major benefits of a fiscal unity is the mutual settlement of profits and losses of the different group companies. Other benefits are the possibility for group reorganization without (current) taxation, and the reduction of tax compliance. And finally, a benefit for (purely domestic taxpayers only) can be that certain interest deduction limitations or loss compensation limitations do not apply.

The fiscal unity may be terminated upon request or will be terminated automatically if any of the conditions for its formation are no longer met.

ANTI-BASE EROSION – DEDUCTIBILITY OF INTEREST

Interest on a loan from a related entity is not deductible to the extent that the loan relates to one of the following transactions:

- 1) A profit distribution or a repayment of paid-up share capital, by the taxpayer or a related entity (which is subject to Dutch CIT), to a related entity or a related individual;
- 2) A capital contribution to a related entity, by the taxpayer, a related entity (which is subject to Dutch CIT) or a related individual (who is a resident of the Netherlands);
- 3) The acquisition or increase of interest in an entity, which, after the acquisition or increase of interest will qualify as a related entity, by the taxpayer, a related entity (which is subject to Dutch CIT) or a related individual (who is a resident of the Netherlands).

Nevertheless, the interest is deductible when:

- 1) the taxpayer can demonstrate that there are sound business reasons for taking up the loan and for the transaction; or
- (2) the interest is subject to a 'sufficient' tax on profits (in general at least 10% on a tax basis that is determined by Dutch legislation) at the level of the recipient and the recipient is not entitled to a loss carry forward (subject to conditions under which the Tax Authorities may demonstrate that the transaction is not entered into under sound business reasons or is entered into to compensate foreseeable losses of the recipient).

INTEREST DEDUCTIBILITY FOR 'EXCESSIVE PARTICIPATION DEBT' RESTRICTED

Interest on "excessive" participation debt is not deductible if and to the extent such interest exceeds € 750,000 per year. Excessive participation interest equals total interest expense multiplied by the fraction which is year-average "participation debt" divided by year-average total debt. Participation debt is defined at the purchase price of participations less total debt (i.e. participations are deemed to be fully financed by equity).

Example: Taxpayer A BV's tax balance sheet (x €1 million)

Debit		Credit	
Participations	400	Equity	250
Other assets	300	Debt	450

A BV's profit before interest is 25. A pays total interest expense on debts of 30. Without the proposed restriction, A BV's profit after interest would be -/- 5. Pursuant to the restriction, A BV's participation debt would be 400 – 250, is 150.

Excessive participation interest expense is 30 (total interest expense) x 150 (participation debt) / 450 (total debt) is 10. Reduced by the € 0.75 million threshold, 9.25 (million) of interest expense would be non-deductible.

In order not to impede “proper” expansion of enterprise, the acquisition of a participation or increase of an existing participation (through capital contributions or purchase of additional shares) which forms and expansion of operational activity (of the group of which the taxpayer forms part) is excluded from the restriction of participation interest expense (i.e. interest is deductible). Internal transfers of participations to Dutch holding companies are (in principle) not considered expansion of operational activity. Expansion of operational activity may still result in non-deductible participation interest expense in certain cases of (deemed) abusive financing (e.g. “double dip”).

In order to alleviate the burden of proof for the taxpayer in relation to ‘old’ participations, for purposes of the excessive participation debt formula, the taxpayer may elect to disregard 90% of the acquisition cost of all participations acquired in or before the book year running or starting on 1 January 2006 (i.e. for book years equal to calendar years all participations acquired on or before 31 December 2006), thus reducing the excessive participation debt by the amount of the acquisition cost of those participations.

INTEREST DEDUCTIBILITY FOR ‘ACQUISITION DEBT’ RESTRICTED

In case a foreign or domestic acquirer uses a debt-financed Dutch acquisition company (“Acquisition Company”) to acquire a Dutch target company and includes such target company into a fiscal unity with its Acquisition Company, or merges such target company with the Acquisition Company, the interest expense on the acquisition debt (“Acquisition Debt”, and “Acquisition Interest”) reduces the taxable profit of the fiscal unity. Pursuant to the Acquisition Interest Provision, aimed at avoiding erosion of the Dutch taxable base described above, Acquisition Interest (including associated expenses and positive and negative fx results) will be deductible only against the stand alone profit of the Acquiring Company (or, in case the Acquisition Company forms part of a fiscal unity, and under certain conditions, Acquisition Interest will be deductible against the fiscal unity profit excluding the profit of the acquired target(s)).

However, this restriction only applies to the lower of:

- (i) Acquisition Interest in excess of € 1 million (“First Limitation”);
- (ii) Interest on the excessive part of Acquisition Debt (“Second Limitation”).

In the first year of inclusion of the acquired participation into the fiscal unity, Acquisition Debt is excessive to the extent it exceeds 60% of the acquisition price. This percentage will decline to 25% in eight years. As from year eight after inclusion of the participation into the fiscal unity, Acquisition Interest paid on Acquisition Debt in excess of 25% of the acquisition price is not deductible.

NON-ARM’S LENGTH LOANS

Recently, the Dutch Supreme Court ruled that the impairment of a loan (that is also qualified as a loan for tax purposes) between related entities, which loan was not entered into under arm’s length conditions, is not deductible. In short, a loan is not entered into arm’s length conditions if a third party only would have been prepared to grant the loan (under the exact same conditions) against a profit dependent interest.

It is recommendable to carefully document the conditions of the loan at the time the loan is entered into. When determining the interest percentage and the repayment schedule, the (lack of) guaranties or collateral by the borrower (or a related entity) should be taken into account.

ACCELERATED DEPRECIATION

If certain requirements are met, the following assets may qualify for accelerated depreciation:

- Assets with a beneficial impact on the environment as listed in a decree;
- Ocean shipping vessels meeting certain exploitation conditions, up to 20% per annum (irrelevant in cases where the Tonnage Tax Regime applies).

NON-RESIDENT CORPORATE INCOME TAX LIABILITY

Non-resident taxpayers are subject to corporate income tax on dividends and capital gains in relation to 5% or larger shareholdings in Dutch companies (“substantial interest tax”), but only if:

1. such shareholdings are not attributable to the capital of a business enterprise (i.e. if such shareholdings are held as a passive investment), and

2. the main purpose or one of the main purposes for holding the substantial interest is to avoid Dutch income tax or Dutch dividend withholding tax being levied from another taxpayer (i.e. from the (ultimate) beneficial owner of the Dutch company).

DUTCH COOPERATIVES AND DIVIDEND WITHHOLDING TAX

In the past, Dutch Cooperative Associations (“Coops”) have become a popular alternative Dutch holding company, as they are – in principle – not subject to Dutch dividend withholding tax, while being eligible for a.o. participation exemption and treaty benefits. As of 2012, however, in abusive situations, members of a Coop can become liable to Dutch dividend withholding tax. Abusive situations may exist where a foreign company owning a participation in a Dutch company interposes a Coop in order to avoid Dutch dividend withholding tax, or where a foreign company owning a foreign participation interposes a Coop to avoid the foreign withholding tax, without the Coop having real (economic) meaning.

FINAL SETTLEMENT (EXIT) TAXES

On 14 December 2011, the Dutch Ministry of Finance issued an Implementation Decree (“the Decree”) on final settlement (exit) taxes, in conformity with the ECJ’s decision in National Grid Indus (C-371/10). In national Grid, the ECJ ruled that:

1. The final tax settlement constitutes a restriction on the freedom of establishment (a transfer of the place of effective management within the Netherlands would not have triggered the tax), but
2. Such restriction is justified under the principle of territoriality, and that the Dutch exit tax legislation is appropriate for ensuring the preservation of the allocation of taxing rights between the Member States concerned;

Following the ECJ’s recommendation, the Decree offers taxpayers the possibility to opt for extension of payment regarding final settlement taxes, subject to conditions. For further information, we refer to our Tax News Bulletin of 6 January 2012 and the unofficial translation of the Decree. A legislative proposal to replace the Decree has been issued and is expected to enter into force (with retroactive effect to 29 November 2011) in 2013.

TAX TREATIES

The network of Netherlands tax treaties for avoidance of double taxation is extensive. Nearly all treaties are based on the OECD Model Tax Convention and some have features of the UN Model Tax Convention between developing and developed countries.

Application of treaties with EU countries may coincide with application of EU regulations, like the Parent-Subsidiary Directive, the Merger Directive or the Arbitration Convention (if and when applicable). In such case, the most beneficial regulation prevails.

In recent years, the Netherlands has concluded Tax Information Exchange Agreements (“TIEA’s”) with a significant number of jurisdictions, many of which are considered tax havens. Not all of these TIEA’s are yet in force. Reference is made to our treaty chart for an overview.

UNILATERAL REGULATIONS FOR AVOIDANCE OF DOUBLE TAXATION

In cases where bi- or multilateral treaties do not provide for avoidance or mitigation of double taxation, the Netherlands apply unilateral regulations for the avoidance of double taxation. The regulations apply to taxpayers (individuals and companies) resident in the Netherlands.

The unilateral regulations apply to:

- ✓ Personal income tax
- ✓ Wage tax
- ✓ Inheritance and gift tax

For profits and other income, the general method for elimination of double taxation is the so-called exemption method; Netherlands tax on the world-wide income is reduced by a percentage that corresponds with foreign income divided by world-wide income. Profits or income must have been subject to tax on profits or income in the other state. Furthermore, profits must have been derived from a permanent establishment in the other state.

Furthermore, double tax relief is available for dividends, interest and royalties arising in countries mentioned in a list of qualifying developing countries, which list includes an important number of countries which are not developing countries in the strict sense of the word. The double tax relief is determined on the basis of the ordinary credit method (whereby a credit for the foreign tax is given), unless double tax relief on the basis of the above-mentioned exemption method would result in lower double tax relief (in which case this lower relief will apply). A number of tax treaties (most often with developing countries) contain tax sparing credit provisions (i.e. a credit based on a higher amount than the actual foreign withholding tax).

AVOIDANCE OF DOUBLE TAXATION FOR PERMANENT ESTABLISHMENTS

Until 1 January 2012, PE losses were immediately deductible from the Dutch taxable base (i.e. can be used to offset head office profits), subject to a later recapture. Under the new Object Exemption, which was introduced as per 1 January 2012, PE losses will no longer be deductible against head office profits.

The Object Exemption will not apply to low taxed passive PE's. In stead of an Object Exemption, profits from low taxed passive PE's are eligible for a fixed 5% credit. PE losses which have become permanent due to the fact that the PE activities have been terminated, and which have not been subject to local loss relief in the PE country, are deductible from the Dutch taxable base in the year in which the PE activities are terminated. Finally, under the proposed Object Exemption, the "subject-to-tax" requirement (mostly in non-treaty situations) will no longer be a condition for relief from double taxation.

LIMITED CARRY FORWARD OF LOSSES

Netherlands companies have the possibility of carrying back losses from business activities to the previous book year, and forward to the next nine book years.

TAX EXEMPT STATUS FOR INVESTMENT COMPANIES

There are three general types of investment funds in the Netherlands:

1. Closed limited partnerships ('besloten commanditaire vennootschappen') or Netherlands resident foreign equivalents thereof
2. Fiscal Investment Funds, ("FIF")
3. Exempt Investment Funds ("EIF")

Closed limited partnerships or Dutch resident foreign equivalents thereof are transparent for Dutch corporate tax income tax purposes as a result of their capital structure. Income from partnership interests are subject to personal income tax at the level of the individual (see Taxation of individuals). Closed limited partnerships are not subject to Dutch dividend withholding tax. They are also not considered residents of the Netherlands and as such are not entitled to Dutch bilateral tax treaty benefits.

FIF's are subject to Dutch corporate income tax, however a zero percent rate applies. As a result of it being subject to Dutch corporate income tax, a FIF is entitled to Dutch bilateral tax treaty benefits. A FIF is subject to Dutch dividend withholding tax, and is required by law to distribute its profit no later than in the eighth month following the end of the taxable year. The FIF regime was designed to enable passive investors to benefit from economies of scale and the spreading of risks through collective investment, without incurring an additional tax burden at the level of the investment fund.

In practice, the obligation to distribute profits in the eighth month after the taxable year appeared to be considered a difficult burden for certain investment funds. As a reaction to this, the EIF regime was introduced as of 1 August 2007. The EIF is exempt from Dutch CIT and exempt from Dutch dividend withholding tax. As a result of its exempt status, it is not entitled to Dutch bilateral tax treaty benefits. Unlike the FIF, the EIF is not required to distribute its profits.

Although the EIF was originally not designed for this purpose, in practice it has been approved that individuals (substantial interest holders) may also benefit from the EIF regime under certain circumstances, and provided that the conditions of the regime can be met.

SHIPPING

Netherlands ship owners and operators can opt for the Tax Tonnage Regime which permits them to determine taxable income not on the basis of the profit and loss account, but on the basis of the vessel's freight capacity, provided that certain conditions are met. For a period of at least 10 years, profits will be based on an amount per net ton of the ship, according to a degressive scale, starting with EUR 9,08 per 1000 net ton per day for the first 1,000 net ton, and decreasing to EUR 0,50 per 1000 net ton above 50,000 net ton. This should be very attractive for ship owners who are generating profits, but it should be borne in mind that this effect backfires when the ship-owner incurs losses later in the 10 year period, while he will be considered to have earned profits for tax purposes. The Tax Tonnage Regime is also available for enterprises which are not (co-)ship-owners, but which take care of the entire crew and technical management of qualifying vessels.

As of 1 January 2010 the owners and operators of cable ships, pipe-line layers, assessment vessels and crane ships are also able to opt for the Tax Tonnage Regime.

RESEARCH AND DEVELOPMENT TAX INCENTIVES

INNOVATION BOX

If the company has opted for the innovation box, an effective 5% corporate income tax (CIT) rate will apply to the EBIT which is derived directly from qualifying intellectual property ("IP"). The innovation box is not limited to income from patents, income from (non-patented) "qualifying R&D-activities" may also be included in the innovation box (see below). R&D expenses are immediately deductible, i.e. in the year in which they are incurred.

The innovation box does not apply to losses from the innovative activity, which means that these are deductible at the regular tax rate of 25%. But the 5% rate will only apply to the proceeds from patents and qualifying R&D-activities after recovery of those losses and expenses at the regular tax rate.

RESEARCH AND DEVELOPMENT FACILITY – LABOUR COSTS

The Research and Development Facility ("RDF") is a reduction for wage tax liability and social security contributions. In effect, it subsidizes R&D labour. In 2012, the deduction is 38% of the first € 200,000 in R&D wage costs, and 14% of the R&D wage costs in excess of € 200,000. The R&D wage costs are calculated using a fixed average hourly wage, which applies to all R&D employees.

Proceeds from intangible property, for which the RDF was granted in the development stage, may be included in the innovation box (see above).

RESEARCH AND DEVELOPMENT DEDUCTION

The Research and Development Deduction ("RDD") is a deemed tax deduction for R&D related expenses, effective as of 1 January 2012. The RDD comes on top of the deduction (expensing or depreciation) of actual R&D expenses, and in addition to the Dutch Innovation Box. The RDD will be 40 percent of the annual R&D costs (R&D labour costs excluded, but see above). The RDD for expenditures of € 1 million or more will be taken into account during a period of five years.

Taxpayers who spend not more than 150 hours per month on qualified R&D activities are entitled to a deemed deduction of € 15 per qualifying R&D hour. Small enterprises spending more than € 50,000 annually are entitled to the 40% RDD.

THE ATR/APA PRACTICE

ADVANCE PRICING AGREEMENT (APA) AND ADVANCE TAX RULING (ATR)

The Netherlands have an advanced and well developed tax system. The possibility of prior open communications with the Tax Administration about issues that may be interpreted in different ways and their tax consequences, resulting in certainty in advance, is considered an essential element. All deliberations take place within the scope of applicable law and jurisprudence. Solutions are determined on a case by case basis and laid down in an A(dvance) T(ax) R(uling), or A(dvance) P(ricing) A(greement).

The APA & ATR Unit, which a.o. deals with agreements and rulings for (sub)license and financing activities, is located at the Rotterdam Tax Administration. This also applies to the Central Desk for potential foreign investors, which operates in close co-operation with the APA & ATR team.

ATR (ADVANCE TAX RULING) - HOLDING COMPANIES

The term ATR is reserved for advance rulings concerning (1) (intra group) holding and management companies, (2) hybrid financing or hybrid entities and (3) (non)existence of permanent establishments within The Netherlands.

The ATR for holding and management companies covers the application of the Dutch participation exemption and the at arm's length character of management fees.

APA (ADVANCE PRICING AGREEMENT) - (INTERMEDIATE) FINANCING AND LICENSING

An APA offers certainty in advance. An APA can cover a wide range of transfer pricing issues. The taxpayer itself can indicate for which elements it requires certainty in advance e.g.:

- specific transactions;
- transactions between specific companies;
- transfer pricing method; and
- whether either a unilateral, or a bi- or multilateral approach is desired;

Advance pricing agreements are based on the OECD and EU transfer pricing guidelines. An important category is the APA for intercompany licensing and financing activities.

The activities of The Netherlands company have to be analysed and defined and an adequate arm's length compensation has to be determined.

If a Dutch company has a real purpose and runs a real risk, which risk is covered by an adequate amount of equity, foreign withholding taxes on interest, (portfolio) dividends, and royalties can be credited against the Dutch corporate income tax liability on such income. Also, a company which has been organised in this way will have more possibilities to prevent or resist challenges by foreign tax administrations regarding the beneficial ownership test which is part of most (more recent) tax treaties in order to benefit from tax treaty protection.

Activities like these can also be implemented without first obtaining a formal APA, and therefore without certainty in advance.

No APA will be obtained in case of insufficient substance in, for example, the management board of the Netherlands company (see Substance Requirements below).

APA'S MORE IN GENERAL

If, in a situation where a unilateral APA applies, the other country makes a transfer pricing adjustment, the APA shall not pre-empt the application of the mutual agreement procedure under a bilateral tax treaty or an opposite adjustment in The Netherlands.

The APA request should include at least the following information:

- character and background of the transactions;
- group structure;
- state(s) involved;
- evidence for the transfer pricing;
- ultimate beneficial ownership disclosure.

SUBSTANCE REQUIREMENTS

An important element of the APA practice is that the substance of The Netherlands company within The Netherlands is strictly observed by the tax authorities. The substance requirements are the following:

- at least half of the managing directors, authorised to make decisions, are Dutch residents.
- the directors must have sufficient professional skills to perform their tasks
- (key) board decisions shall be made in The Netherlands
- the company is entitled to and authorised in respect of its (major) bank accounts
- the book and records of the company must be kept in The Netherlands
- the company must fulfil all its filing obligations (tax returns, etc.)
- the company's business address must be in The Netherlands and the company must not also be resident for tax purposes in another country
- the company's equity must be appropriate in light of its activities, taking into account both the assets and the risk incurred.

Kindly note that these substance requirements can relatively easily be met in practice.

CENTRAL DESK FOR POTENTIAL FOREIGN INVESTORS

In order to be able to obtain a prior confirmation of their future tax position before making investment decisions without unnecessary delay, potential foreign investors should discuss relevant issues preferably with one single tax commissioner who has a broad experience and expertise in this field.

Based on this concept, the tax authorities have created a Central Desk for such investors with the Rotterdam Tax Administration. The Central Desk can issue prior confirmations in the field of corporate income tax, wage withholding tax, dividend withholding tax, personal income tax and value added tax.

Also, arrangements about customs duties can be initiated via the Central Desk. This Desk acts in close co-operation with the ATR & APA Institute.

Obviously, such arrangements can only be made within the boundaries of legislation and case law. Inter alia, the following issues can be confirmed with the Central Desk:

- so-called informal capital contributions;
- treatment of royalties (tax deductibility);
- lifetime over which assets can be depreciated;
- applicability of 30% rulings (personal income tax);
- permits to postpone payment of VAT on imported goods from the moment of importation until the VAT over the relevant period is due (in principle the same VAT can be deducted simultaneously which results in significant cash flow advantages).

IMMOVABLE PROPERTY

REAL ESTATE TRANSFER TAX

The Netherlands impose a tax upon the transfer of the legal (or economic) ownership of real estate located within the Netherlands. Also the transfer of shares in certain companies can be treated as the transfer of real estate held by such companies (so called “real estate companies” or “REC’s”). As of 2011 the rules applicable to REC’s have been further tightened, in an effort to combat abusive transactions. Under these rules, broadly, real estate transfer tax is due in cases where, at the time of the transfer or any time during the year before the transfer, the fair market value of real estate represents at least 50% (until 2011: 70%) of the company’s assets, and at the same time at least 30% of the real estate is situated in the Netherlands, the real estate is held mainly (i.e. for 70% or more) for the sale, acquisition or exploitation of such real estate (i.e. passive investment), and the purchaser acquires (including any shares already owned) a shareholding of 1/3 (in case the acquirer is a company; 7% in case the acquirer is an individual) in the capital of the company or increases such shareholding. Under these new rules, real estate abroad also counts for the assets test since 2011. This means that, at least theoretically, the transfer of shares in a foreign company, the assets of which consist also of at least 30% Dutch real estate, may be subject to Dutch real estate transfer tax, even if the transferor and/or transferee are non-Dutch residents. It can be expected that the real estate transfer tax will be very difficult to administer, levy and collect, in such cases.

The tax is levied from the purchaser of the real estate. The present rate amounts to 6% of the sales price (or if applicable the higher fair market value of the real estate). A number of exemptions apply, amongst others in cases where a transfer is subject to value added tax (VAT) and in the case of restructurings of enterprises.

TAXATION OF INDIVIDUALS

GENERAL

Individuals resident in the Netherlands are subject to personal income tax on their world wide income; non resident individuals are subject to personal income tax on income from Dutch sources. At first sight, the burden of personal income tax in the Netherlands appears to be a high one, taking into consideration the maximum personal income tax rate of 52%. However, in many cases the average tax burden is less than one would expect, since the Netherlands is one of the few countries allowing taxpayers full deduction of interest on (mortgage) loans to finance their houses from their taxable income. Also, qualifying expatriates can benefit from so called 30%-rulings.

For personal income tax purpose three types of income are recognised i.e.:

- employment and business income, subject to progressive personal income tax (PIT) and social security rates of up to 52% (box 1);
- income from substantial shareholdings, subject to a flat rate of 25% (box 2) and
- investment income, subject to a flat rate of 30% on the return of the investment. The return on the investment is fixed at 4%. This means that the effective tax rate amounts to 1.2 % of the value of the net investment. (box 3).

The consequence of the box system is that losses in one box cannot be offset against income from another, but only against income from the same box. Taxpayers are not entitled to tax free amounts. Instead, resident taxpayers are entitled to a fixed credit against their total annual PIT liability. The normal credit for a taxpayer who earns significant employment income amounts to € 3,724. Several additional credits are available depending on personal circumstances.

Due to regulations assets and income of trusts and trust-like entities can be imputed to the settlor for tax purposes. If the settlor is no longer alive the assets and income will be considered as assets and income of the heirs. The imputation will not be made if the heirs prove that they are not the beneficiaries. Trust assets and income will not be taxed if the assets and income are taxed in another country to a flat rate of 10 % or more.

BOX 1 – BUSINESS AND EMPLOYMENT INCOME

RATES

TAXABLE INCOME			PERSONAL INCOME TAX		GENERAL SOCIAL SECURITY CONTRIBUTION	
BRACKET						
€		€	% Max	€	%	Max €
0	-	19.645	5.85	1.149	31.15	6.119
19.645	-	33.363	10.85	14.88	31.15	4.273
33.363	-	55.991	42.0	9.504		
55.991	-	excess	52.0			

BOX 2 - INCOME AND CAPITAL GAINS FROM SUBSTANTIAL SHAREHOLDINGS

For resident tax payers a substantial shareholding is recognised when the taxpayer holds, together with his partner (including spouse), directly or indirectly:

- 5% or more of any class of share capital in a company with a capital divided into shares; or
- option rights giving rights to acquire, directly or indirectly, 5% or more of any class of shares in a company with a capital divided into shares; or
- profit sharing rights to 5% or more of the annual profits or liquidation proceeds of a company with a capital divided into shares; or
- so called long term usufruct and similar rights to 5% or more of any class of shares in a company with a capital divided into shares;

If a substantial shareholding is recognised in one of the above categories, all other shares, option rights, profit sharing rights and usufruct and similar rights are deemed to form part of the substantial shareholding. If the taxpayer himself does not have a substantial shareholding but his partner or certain other relatives do so, the shares, option rights, profit sharing rights and usufruct and similar rights owned by the taxpayer are deemed to form a substantial shareholding.

Where a substantial shareholding exists, profit distributions by the company and capital gains realised upon sale of the shares are subject to personal income tax at a flat rate of 25%.

For non-resident taxpayers the above only applies in case of a substantial shareholding in a company resident in the Netherlands which share holding does not form part of the capital of a business enterprise of the tax payer. If such a Dutch resident company transfers its seat of residence to a place outside the Netherlands, such transfer is considered as a deemed disposal of the substantial shareholding by the non-resident taxpayer.

BOX 3 - DEEMED INCOME FROM NET WEALTH

Net wealth is taxed at a flat rate of 30% over a fixed deemed return of 4% per year. The deemed return is calculated over the amount of net wealth as of 1 January of the taxable year. The annual tax burden will thus amount to 1.2% of the amount of net wealth.

For foreign private investors this system could open new planning opportunities. For example, foreign private individuals who invest in Dutch real estate, which is fully financed with debt, do not have taxable income in the Netherlands, as the net investment is zero. At the same time, the individual may be able to claim income tax relief for the actual income in his country of residence under an applicable double tax treaty.

30% RULINGS

For highly qualified employees who come to work in the Netherlands on a temporary basis, the tax burden and the way of determining taxable income could create serious problems if the Netherlands did not have special regulations for such employees. Therefore, for a maximum period of eight years, so-called 30% rulings are available for qualifying individuals, who come to work in the Netherlands on a temporary basis. As from 1 January 2012, some changes were introduced:

- The maximum term of the 30% ruling is eight years (before 2012: ten years);
- This term is reduced with the periods of previous stay in the Netherlands in the last 25 years (before 2012: 10 to 15 years);
- A minimum gross salary¹ of € 35.770 is required (€ 51.100 before reduction of the 30% allowance), except for:
 - Employees under 30 with a Master degree (€ 27.190, respectively € 38.843)
 - Scientists (no minimum);
- Employees must have lived more than 150 KM from the Dutch border in more than two-thirds of the 24 month period before commencement of the Dutch employment (this is to avoid unintended use by people who live just across the border; litigation pending re compatibility of this provision with EU law);
- Scarcity of the employee's skills should (only) be demonstrated if the salary in (almost) the entire branch is higher than the above mentioned minimum salary.
- Transitional rules apply to rulings that were granted before 1 January 2012.

The first advantage of the 30% ruling is, broadly, that the employer may grant the employee a tax-free allowance equal to 30% of his gross employment income without having to prove that this is a reimbursement of extra-territorial costs (i.e. extra costs of temporarily staying outside the country of origin). The employment contract will have to stipulate that the gross salary includes a 30% allowance as defined by law. As a result the employee will be taxed on approximately 70% of this employment income.

The second advantage of such ruling is the possibility for the employee to opt for a treatment as a partially non resident taxpayer, which implies that the employee is only taxed as a resident for box 1 income; for box 2 and 3 income he can opt for taxation as a non resident.

School fees for primary and secondary international schools can be reimbursed by the employer on a tax-free basis.

¹ Amounts mentioned are applicable in 2013. All amounts are adjusted for inflation annually.

POSSIBILITY TO OPT FOR TREATMENT AS A RESIDENT TAXPAYER

In order to comply with the decision of the EC Court of Justice in a.o. the Schumacker case, it is possible for non-resident taxpayers to opt for treatment as a deemed resident taxpayer, thus obtaining (most of) the allowances and deductions available to ordinary resident taxpayers. Opting is possible only if a number of requirements, aimed at preventing abuse, are met. One requirement is that the non-resident taxpayer opting for treatment as a deemed resident taxpayer has to be a resident of an EU Member State or a state, further specified in an administrative circular, in which he is subject to local PIT and with which the Netherlands have concluded a double tax treaty containing a clause for exchange of information. Opting for treatment on the basis of deemed residence also implies opting for certain disadvantages which resident taxpayers have. For example, the PIT rate on Netherlands income is based on the world wide income – and not just Netherlands source income – so that the taxpayer cannot have the benefit of low progressive PIT rates if only a small part of his income is derived from Netherlands sources. Opting for treatment as a deemed resident taxpayer implies that firstly Netherlands PIT is computed on the world wide taxable income, including foreign source income, after which relief will be given for income components that do not qualify as Netherlands source or that, under a double tax treaty, are allocated to the state of residence of the taxpayer. Opting for treatment as a deemed resident taxpayer does not imply that such taxpayer will be in a position to claim treatment as a resident of the Netherlands for purposes of the tax treaties concluded by the Netherlands.

SOCIAL SECURITY AND SOCIAL INSURANCE

The Netherlands social security scheme covers social security (i.e. benefits on retirements and death), social insurance (i.e. benefits on disability, medical aid and sickness) and basic health insurance. In contrast to some EU countries, social security contributions are capped. As this is not the case in some EU Member States like France or Belgium, this makes The Netherlands attractive for highly qualified labour. The Netherlands is a party to various international regulations. Most important are the EC Regulation 1408/71 and 883/2004.

Also, the Netherlands have concluded social security arrangements with, inter alia, Australia, Canada, Israel, Yugoslavia, Norway, New Zealand, the United States and Switzerland.

Usually, international agreements start from the principle that an employee is insured in the country where his employment is exercised. Therefore, an employee working in the Netherlands is covered by Dutch social security, subject to two possible exemptions.

Firstly, most regulations contain special provisions for temporary secondment. Under EC Regulation 1408/71, an employee may remain insured in his home country upon request, provided, inter alia, that his secondment is not expected to last more than 12 months, and that his remuneration is paid by an employer in his home country. An extension of not more than 12 months can be granted if the secondment lasts longer than the first 12 months due to unforeseen circumstances. Secondly, most international regulations permit the authorities to depart from their basic rules. Under EC Regulation 1408/71, the Netherlands authorities permit the social security scheme of the state of origin remains applicable for a maximum period of five years, or sometimes for an even longer duration of certain projects.

In May 2010 EC Regulation 1408/71 was replaced by EC Regulation 883/2004. The period of the first exemptions in EC Regulation 1408/71 has been extended to 24 months. Extension of 12 months due to unforeseen circumstances is not possible under the new EC Regulation. An employee working in the Netherlands will only be covered by Dutch social security if the employee does not work 25 % of the period in the country where the employee is a resident. The new EC Regulation does not contain special regulations considering international transport. Furthermore, it is no longer possible to be insured in two countries. During a transitional period of no more than 10 years, the provisions of Regulation 1408/71 continue to apply for existing situations (as long as this situation does not change). The employee can also request for application of the new Regulation.

INHERITANCE AND GIFT TAX

Inheritance and gift taxes are imposed if property is acquired by inheritance or gift and the deceased or the donor was a resident of the Netherlands at the time of death or of the gift, or deemed to be a resident.

As of January 2010 the new Dutch inheritance- and gift tax act has entered into force. Under the new legislation Dutch immovable property or assets from a Dutch permanent establishment that are acquired from a deceased or donor who was a non-resident is no longer subject to inheritance and gift tax.

The tax rates and exemptions have been simplified. The business succession facility has been enlarged. If the value of the business does not exceed € 1.028.132 the exemption is 100%, in all other cases it is 83%. For the tax due, a 10-year tax deferral is granted.

TRUSTS

In recent years, there has been a significant increase in the use of Dutch and foreign trust and trust-like entities to avoid income tax, inheritance tax, and gift tax. Commonly used trusts are the Anglo-American trust, the Dutch foundation, the “Stiftung”, the “Anstalt”, the Dutch Antilles “Individual Fund Foundation” (“Stichting Particulier Fonds”), the “Treuhand”, etc.

Anti abuse legislation was introduced as of 1 January 2010. Pursuant to this legislation, for income tax purposes (and for certain corporate income tax purposes), the assets and liabilities, income and expense of the trust, are attributed to, and taxed with, the contributor (settlor). This attribution rule does not apply to assets and liabilities, income and expenses, in relation to which the trust itself is subject to a tax which is considered ‘real’ by Dutch standards (i.e. a tax of at least 10% over a taxable basis which is at least as broad as the Dutch taxable basis would be). After the death of the contributor, the assets and liabilities will be attributed to, and taxed with, the heir(s) (unless an heir can demonstrate that he/she will never be a beneficiary of the trust).

The attribution is also applicable for the inheritance and gift tax. Contributions of capital to the trust are therefore not subject to gift tax. The heirs will be taxed with inheritance tax upon the contributors death, since the assets and liabilities will then be attributed to them (this also applies when the contribution takes place upon the death of the contributor).

Payments made by the trust to the beneficiaries are treated as payments made by the contributor to the beneficiaries. The beneficiaries are subject to gift tax upon obtaining any legally enforceable right to the capital of the trust.

The legislation also applies to existing structures. Please note that the legislation is not limited to the irrevocable discretionary trust, but may also apply to other types of trusts.