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Corporate Tax 2023

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NETHERLANDS

Law and Practice

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1. Types of Business Entities, Their Residence and Basic Tax Treatment

1.1 Corporate Structures and Tax Treatment

Large businesses in the Netherlands typically carry out their activities via a limited liability company (*besloten vennootschap* or BV) or – to a lesser extent, typically in the case of a listed company – via a public limited company (*naamloze vennootschap* or NV) or a no-liability co-operative (*coöperatieve UA*). Each of these legal forms has a legal personality so that the entity can own assets in its own name, and the shareholders (membership right-holders in the case of a co-operative) as a starting point cannot be held personally liable for corporate obligations.

A BV, NV and co-operative are separate taxpayers for Dutch corporate income tax purposes.

Reverse Hybrid Rules

As a final part of the implementation of the EU Anti-Tax Avoidance Directive 2 (ATAD 2), the reverse hybrid rule entered into effect on 1 January 2022. A reverse hybrid entity is an entity that for Dutch tax purposes is considered transparent (generally a partnership), whereas the jurisdiction of one or more related participants holding in aggregate (directly or indirectly) at least 50% of the votes, interest or profit entitlements, qualify the entity as non-transparent (ie, consider the entity a taxpayer for profit tax purposes). Pursuant to the reverse hybrid rule, entities incorporated or established in the Netherlands that in principle qualify as tax transparent, may nevertheless be considered non-transparent and integrally subject to Dutch corporate income tax. If, and to the extent that, the income of the reverse hybrid entity is directly allocated to participants in jurisdictions that classify the entity as transparent, the reverse hybrid rules provide for a deduction of the income at the level of the reverse hybrid entity.

If a Dutch transparent entity is considered a reverse hybrid entity, distributions by the reverse hybrid entity would in principle become subject to Dutch dividend withholding tax to the extent the recipient of the distribution is a participant that classifies the entity in its jurisdiction as non-transparent. In addition, interest and royalty payments by a reverse hybrid entity will in principle become subject to a conditional withholding tax provided that the recipient of the payment treats the reverse hybrid entity as non-transparent. See **4.1 Withholding Taxes**.

Furthermore, foreign participants could – in (deemed) abusive situations – be subject to Dutch corporate income tax in respect of capital gains and/or dividends derived from its participation in a reverse hybrid entity. See **5.3 Capital Gains of Non-residents**.

1.2 Transparent Entities

In the Netherlands, the tax-transparent entities typically used are a limited partnership (*commanditaire vennootschap* or CV), a general partnership (*vennootschap onder firma* or VOF) and a fund for joint account (*fonds voor gemene rekening* or FGR). Each of these legal forms lacks legal personality and should be considered as a contractual business arrangement.

VOFs

As a VOF is tax transparent, it is not a taxpayer for Dutch corporate income tax purposes. Instead, the underlying participants are taxed for their participation in a VOF. Distributions by a VOF are not subject to Dutch dividend withholding tax.

CVs and FGRs

With respect to a CV and an FGR, the Dutch corporate income tax treatment depends on whether the entity is considered open or closed. An open CV/FGR is subject to Dutch corporate income taxation as such, whereas in the case of a closed CV/FGR, the underlying participants are taxable for the income derived from their interest in the CV/FGR. A CV or FGR is closed if all limited and general/managing partners separately and upfront have approved each accession, resignation or replacement of participants. Alternatively, an FGR is also considered closed if participations can be transferred exclusively to the FGR itself.

Partnerships

The Dutch government is currently reviewing the law with respect to partnerships (ie, CVs, VOFs and *maatschap*). In 2019, the Dutch government published a consultation document to amend the Dutch civil law rules for partnerships. In October 2022, the Dutch government started a second consultation round which includes a proposal to modernise both the civil and tax rules with respect to partnerships. The main element of the proposed rules is that all public partnerships (ie, partnerships that participate in legal transactions under a name used by the partnership in a clearly recognisable manner) acquire legal personality. The draft legislative proposal for tax purposes regulates the tax consequences of granting legal personality to public partnerships.

New Legislation

Specific guidance is in place, by way of a decree, to classify foreign vehicles (both non-transparent and transparent) for Dutch tax purposes. In that respect, it is also relevant whether the approval of (all the) other partners is required to transfer an interest. This guidance is currently being reviewed by the Dutch government. In 2021, the Dutch government published a consultation document to amend the Dutch classification rules for certain domestic and foreign legal entities, but in view of the significant number of responses received as part of the consultation, it was decided to take more time to assess the impact of the proposed amendments. A new legislative proposal is expected to be submitted in the third quarter of 2023 (with effect from 1 January 2024). One of the proposed amendments, for example, was that the above-mentioned consent requirement should be abolished and as such all existing open CVs will become transparent for Dutch tax purposes.

1.3 Determining Residence of Incorporated Businesses

For Dutch corporate income tax purposes (with the exception of certain provisions, such as the fiscal unity regime and the participation exemption), a BV, NV or co-operative is deemed to be a corporate income tax resident in the Netherlands (regardless of the place of effective management of the entity) if it is incorporated under the laws of the Netherlands (the “incorporation principle”). If a double tax convention is applicable that includes a tie-breaker rule and both treaty-contracting states consider a company to be a resident of their state, typically the place of effective management of a company is conclusive for the place of residence for tax treaty purposes, which is the place where the strategic commercial and management decisions take place. Important elements for determining this place are, for example, the residency of board members and the location of board meetings.

In several treaties, the number of which is expected to increase due to the effect of the multilateral instrument (MLI) to implement the OECD base erosion and profit shifting project

(BEPS), the residency is determined on the basis of a mutual agreement procedure (MAP) between the two states if both treaty-contracting states consider a company a resident of their state.

1.4 Tax Rates

Corporate income taxpayers are subject to a corporate income tax rate of 25.8% (2023) with a step-up rate of 19% for the first EUR200,000 of the taxable amount.

An individual who is a personal income tax resident of the Netherlands is liable for personal income taxation on their taxable income, including business income, at the following progressive rates (brackets and rates for 2023):

- EUR0 to EUR37,149 – 9.28% tax rate, 27.65% social security rate, which equals 36.93% combined rate;
- EUR37,149 to EUR73,031 – 36.93% tax rate; and
- EUR73.031 upwards – 49.5% tax rate.

The social security rate applied to individuals who are retired is 9.75%, resulting in a combined rate of 19.03%. The official retirement age in the Netherlands in 2023 is 66 years and ten months. The retirement age will increase by three months this year and will thus reach 67 in 2024. After that, the retirement age will increase not by one year for every year that people live longer, but by eight months.

2. Key General Features of the Tax Regime Applicable to Incorporated Businesses

2.1 Calculation for Taxable Profits

The business income of personal income taxpayers and corporate income taxpayers is determined on the basis of two main principles, which have been shaped through extensive case law. The first is the at arm's length principle (which serves to establish the correct overall amount of profit or the *totaalwinst*) and the second is the sound business principle also known as sound business practice (*goed koopmansgebruik*, which serves to attribute the profit to the correct financial year, the *jaarwinst*).

It should be noted that the Dutch fiscal concept of business income is, strictly speaking, independent of the statutory accounting rules. In practice, both regimes overlap to a certain extent.

Based on the at arm's length principle, a business income is adjusted to the extent that it is not in line with it. Thus, both income and expenses can be imputed in a group context for Dutch tax purposes, regardless of whether the accounting system is statutory or commercial. For corporate income taxpayers this can result in informal capital or hidden dividends. As of 1 January 2022, legislation has entered into force targeting mismatches resulting from the application of the arm's length principle. The legislation inter alia aims to render the arm's length principle ineffective between related parties in cross-border situations to the extent that it will deny the deduction of at arm's length expenses, so that the corresponding income is not included in the basis of a (local) profit tax at the level of the recipient.

2.2 Special Incentives for Technology Investments

The Two Main Tax Incentives

Innovation box

The first main tax incentive is the innovation box which, subject to certain requirements, taxes income in relation to qualifying income from intangible assets against an effective tax rate of 9%, instead of the statutory rate of 25.8%. The regime was amended on 1 January 2017 to reflect, among other things, that only R&D activities that take place in the Netherlands are eligible for the beneficial tax treatment (eg, Nexus Approach). Qualifying intangible assets are R&D activities for which a so-called R&D certificate has been issued or that have been patented (or an application to this effect has been filed). Software can also qualify as an intangible asset.

Wage withholding

The second main tax incentive is the wage withholding tax credit. This allows employers to reduce the amount of wage withholding tax that has to be remitted to the tax authorities, with 32% up to an amount of wage expenses in relation to R&D activities of EUR350,000, and 16% for the remainder in 2023. The wage withholding tax credit for start-up entrepreneurs in 2023 is, under certain conditions, 40% up to an amount of wage expenses in relation to R&D activities of EUR350,000.

Tax Incentives for Sustainability

In addition, special tax incentives apply to stimulate sustainability. For example, businesses that invest in energy-efficient assets, technologies or sustainable energy may benefit from the Energy Investment Allowance (*Energie Investeringsaftrek* or EIA). As for environmentally sustainable investments, the Environment Investment Allowance (*Milieu Investerinsgaftrek* or MIA) and the Arbitrary Depreciation of Environmental Investments (*Willekeurige afschrijving milieubedrijfsmiddelen* or “VAMIL”) may apply.

2.3 Other Special Incentives

Shipping companies can apply for the so-called tonnage tax regime, whereby the income from shipping activities is essentially determined on the basis of the tonnage of the respective vessel, which should result in a low effective corporate income tax rate. Qualifying income from shipping activities is, for example, income earned from the exploitation of the vessel in relation to the transportation of persons and goods within international traffic, the transportation of persons and goods in relation to natural resources, and pipe and cable laying.

The measures taken by the Dutch government in view of the COVID-19 crisis, such as relaxation of payment of taxes, have been terminated. Taxpayers who have in principle invoked the relaxation of payment of taxes have until 1 October 2027 to pay off their tax debt.

2.4 Basic Rules on Loss Relief

Before 1 January 2022, taxable losses could be carried back one year and carried forward six years. From 1 January 2022, tax loss carry-forwards are limited to 50% of the taxable income exceeding EUR1 million for that year. At the same time, the six-year tax loss carry-forward period which previously applied has been abolished so that tax losses can be carried forward indefinitely (but limited to 50% of the taxable income in a financial year).

Specific anti-abuse rules have to be observed. Anti-abuse rules may apply in some cases, due to which, losses cease to exist in the case of a substantial change of the ultimate ownership of the shares in the company which suffered the tax losses. For financial years starting on or after 1

January 2019, the so-called holding and financing losses regime has been abolished. Until that date, such losses are ring-fenced and can only be offset against holding and financing income.

2.5 Imposed Limits on Deduction of Interest

As a starting point, at arm's length interest expenses should in principle be deductible for Dutch corporate income tax purposes. A remuneration only classifies as "interest" if the financial instrument is considered "debt"for tax law purposes. In addition, a number of interest deduction limitation rules have to be observed to determine if interest expenses are deductible in the case at hand. The most important rules are detailed below.

- If a loan agreement economically resembles equity (eg, since the loan is subordinated, the interest accrual is dependent on the profit and the term exceeds 50 years), the loan may be requalified as equity for Dutch corporate income tax purposes, due to which the interest would be requalified as a dividend, which is not deductible.
- If a granted loan is considered to be a non-businesslike loan (*onzakelijke lening*) from a tax perspective, it may effectively result in limitation of deductible interest because of a possible (downward) adjustment of the applied interest rate for Dutch tax purposes.
- Interest expenses due on a loan taken on from a group company that is used to fund capital contributions or repayments, dividend distributions or the acquisition of a shareholding may, under certain circumstances, not be deductible. With retroactive effect to 1 January 2018, this provision applies to companies included in a fiscal unit (ie, a Dutch tax group) as if no fiscal unity has ever existed.
- Interest expenses due on loans taken on from a group company should not be deductible, if the loan has no fixed maturity or a maturity of at least ten years, while de jure or de facto no-interest remuneration or an interest remuneration that is substantially lower than the at arm's length remuneration has been agreed upon.
- For financial years starting on or after 1 January 2019, as part of the implementation of ATAD, the deduction of interest expenses is limited to 30% of a taxpayer's EBITDA (so-called "earnings stripping rules"). Since 1 January 2022, this has been further limited to 20% of a taxpayer's EBITDA.
- The neutralising measures of ATAD 2 have been effective since 1 January 2020. ATAD 2 aims in principle to neutralise hybrid mismatches resulting in mismatch outcomes between associated enterprises (ie, in short, situations with a double deduction or a deduction without inclusion). As a result, interest deductions may be limited or denied.
- For Dutch corporate income tax purposes, interest deductions for banks and insurers are limited where the debt financing (*vreemd vermogen*) exceeds more than 91% of the total assets (in 2023). In other words, under the proposed legislation, banks and insurers are required to have a minimum level of equity capital of 9% in place, to stay out of scope of the proposed interest deduction limitation rule. The equity ratio is determined on 31 December of the preceding book year of the taxpayer.

2.6 Basic Rules on Consolidated Tax Grouping

For Dutch corporate income tax purposes, corporate taxpayers that meet certain requirements can form a so-called fiscal unit. The key benefits of forming a fiscal unit are that losses can be settled with positive results within the same year (horizontal loss compensation) and only one corporate income tax return need be filed, which includes the consolidated tax balance sheet and profit-and-loss account of the entities consolidated therein. The main requirements for forming a fiscal unit are that a parent company should have 95% of the legal and economic ownership of the shares in a given subsidiary.

Moreover, the Dutch tax legislator has newly responded to the obligations following from further EU case law to arrive at an equal tax treatment of cross-border situations when compared to domestic situations, by means of limiting the positive effects of fiscal unity in domestic situations (instead of extending those positive effects to cross-border situations). Mostly with retroactive effect to 1 January 2018, several corporate income tax regimes (ie, various interest limitation rules, elements of the participation exemption regime and anti-abuse rules in relation to the transfer of losses) are applied to companies included in a fiscal unit (ie, a Dutch tax group) as if no fiscal unit has ever existed. This emergency legislation should be followed up by a new, future-proof Dutch tax group regime that is expected to replace the current regime in several years' time.

There has been public consultation with respect to the new, future-proof Dutch tax group regime and the alternatives are still under review. The Dutch State Secretary of Finance indicated in June 2022 that the government does not consider it expedient to introduce a new regime in this cabinet period. It is therefore expected that the current regime will remain in place for the next couple of years.

2.7 Capital Gains Taxation

Capital gains (as well as capital losses) realised on assets of a Dutch corporate income taxpayer are considered taxable income that is taxable at the statutory tax rate, unless it concerns a capital gain on a shareholding that meets all the requirements to apply the participation exemption. Based on the participation exemption, capital gains and dividend income from qualified shareholdings are fully exempt from the Dutch corporate income tax base.

Essentially, the participation exemption applies to shareholdings that amount to at least 5% of the nominal paid-up capital of the subsidiary, the capital of which is divided into shares while these shares are not held for portfolio investment purposes. The latter should generally be the case if a company has substantial operational activities and no group financing or group leasing activities are carried out, or a company is sufficiently taxed with a profit-based tax.

In relation to the application of the Dutch participation exemption by Dutch intermediary holding companies with no/low substance, the Dutch government has decided (for the time being) not to introduce legislation to enable the exchange of information with other jurisdictions. A possible amendment of the Dutch rules on exchange of information will be reviewed by taking into consideration the proposed directive on the misuse of shell entities that was published by the European Commission at the end of 2021 ("ATAD 3"). In December 2022, an amended proposal was published, which was approved by the European Parliament in January 2023 and is currently under review for a final decision by the European Council.

Liquidation Loss

Under the former rules, a shareholder that held at least 5% of the shares in a Dutch company was allowed to deduct a so-called liquidation loss, upon the completion of the dissolution of such company and provided certain conditions were met. This liquidation loss broadly equals the total capital invested in that company by the shareholder minus any liquidation proceeds received. As of 1 January 2021, additional requirements (ie, on top of the existing requirements) need to be met to be able to deduct liquidation losses exceeding the threshold of EUR5 million.

These additional requirements among others relate to the residence of the liquidated company (which, in short, should be within the EU/EEA) and the fact that the Dutch shareholder of the liquidated company must have decisive control to influence the decision-making of the company that is liquidated.

2.8 Other Taxes Payable by an Incorporated Business

Enterprises, be it transparent or opaque, may become subject to value added tax (VAT) when selling services or goods in the Netherlands.

Real estate transfer tax (RETT) at a rate of 10.4% should, in principle, be due upon the transfer of real estate or shares in real estate companies. For residential real estate, a rate of 2% applies and, since 2021, this rate can only be applied by individuals to the acquisition of their primary residence. As a result of the foregoing, real estate investors can no longer apply the 2% rate. As of 2021, there is a RETT exemption for “starters” (ie, persons between the ages of 18 and 35 buying their first primary residence). From 1 January 2023, this RETT exemption has only applied to real estate worth less than EUR440,000.

2.9 Incorporated Businesses and Notable Taxes

The transfer of shares in companies that predominantly own real estate as portfolio investment may, under certain conditions, become taxable at 10.4% RETT.

3. Division of Tax Base Between Corporations and Non-corporate Businesses

3.1 Closely Held Local Businesses

Typically, but not always, only small businesses and self-employed entrepreneurs, partially including small independent businesses without staff (*zelfstandigen zonder personeel* or ZZP), operate through non-corporate forms while medium and large businesses manage their activities via one or more legal entities (eg, BVs).

3.2 Individual Rates and Corporate Rates

There are no particular rules that prevent individual professionals from earning business income at corporate rates. For tax purposes, an individual is free to conduct a business through a legal entity or in person. However, despite the legal and tax differences between those situations, the effective tax burden on the business income will often largely align. The combined corporate income tax rate and the personal income tax rate for substantial shareholders almost equals the personal income tax rate for individuals.

Broad Balance Between Taxation of Incorporated and Non-incorporated Business Income

Under the current substantial shareholding regime (which roughly applies to individuals holding an interest in a company of at least 5% of the share capital), dividend income (as well as capital gains) is subject to 26.9% personal income taxation (2023). The corporate income taxation on the underlying profit currently amounts to 19% for the first EUR200,000 and 25.8% beyond that. This is a combined effective tax rate of approximately 45.76% (2023).

The top personal income tax rate amounted to 49.5% at the time of writing in 2023 (applying to a taxable income exceeding EUR73,031 per annum). Due to the application of several exemptions for individuals earning non-incorporated business income, the effective tax rate is substantially lower.

3.3 Accumulating Earnings for Investment Purposes

It is mandatory for substantial shareholders to earn a minimum salary from the BV of which they are a substantial shareholder, to avoid all earnings remaining undistributed and due to which the substantial shareholder may unintendedly benefit from social security benefits. In principle, the mandatory minimum salary amounts to the highest salary of the most comparable job, that is, the highest salary earned by an employee of a company or a related entity, or EUR51,000 (2023).

If it can be demonstrated that the highest amount exceeds the salary of the most comparable job, the minimum salary is set to the salary of the most comparable job, with a minimum of EUR51,000 (2023).

On 1 January 2023 new legislation was also introduced to prevent entities from granting excessive loan amounts to individual shareholders.

3.4 Sales of Shares by Individuals in Closely Held Corporations

Typically, individuals can conduct business activities in person or as a substantial shareholder of a legal entity (eg, a BV). In the case of business activities that are carried out in person (either alone or as a participant in a tax-transparent partnership), the net result of the enterprise is taxed with Dutch personal income taxation at a top rate of 49.5% in 2023, to the extent that the amount of taxable profits exceeds EUR73,031. Note, however, that a base exemption of 14% (2023) applies, which lowers the effective tax rate. The gain on the transfer of the enterprise (eg, the transfer of the assets, liabilities and goodwill) is also taxable at the same rates as regular profits.

Where business activities are carried out via a BV, the shares of which are owned by substantial shareholders, the business income is subject to corporate income taxation. To the extent that the profit after tax is distributed to a substantial shareholder in the Netherlands, 26.9% personal income taxation is due. A capital gain realised by a substantial shareholder is also taxable at a rate of 26.9% in 2023.

3.5 Sales of Shares by Individuals in Publicly Traded Corporations

Dividend income that is not considered part of business income and is received by individuals that do not qualify as a substantial shareholder (essentially being, a shareholder who is not an entrepreneur and who holds at least 5% of the shares in a company) is not taxed as such. Rather, the income from portfolio investments (including portfolio dividends) is deemed to be 6.17% of the fair market value of the underlying shares (and other investments held by the taxpayer) minus 2.46% of the value of the debts owed by it in 2023. This deemed income is taxable at a rate of 32%, to the extent that the net value of the underlying shares exceeds the exempt amount of EUR57,000 (2023).

Following this, on 24 December 2021, the Dutch Supreme Court ruled that the Dutch income tax levy on savings and investments in 2017 and 2018, under specific circumstances, violated the European Convention on Human Rights and the First Protocol thereto. In response to this, the Dutch government (among other things) amended the Dutch regime for income from savings and investments for the years 2023, 2024 and 2025. In addition, it has been announced that the current tax regime for income received by individuals who do not qualify as a substantial shareholder will be further amended as per 1 January 2026. It has been indicated that taxing the actual return on the investment (instead of the deemed income) is the ultimate goal. No proposal has been published as yet.

4. Key Features of Taxation of Inbound Investments

4.1 Withholding Taxes

The Netherlands has a withholding tax on dividends that, in principle, taxes dividends at a rate of 15%. Based on the EU Parent-Subsidiary Directive, a full exemption should be applicable for shareholders (entities) with a shareholding of at least 5%, subject to certain requirements (see below). If all requirements are met, under Dutch domestic law, a full exemption should also be available if the shareholder is a resident of a state with which the Netherlands has concluded a double taxation treaty, even in cases where the double taxation treaty would still allow the Netherlands to levy dividend withholding tax. An exemption is only available if the structure or transaction is not abusive and is entered into for valid commercial business reasons.

Dividend-Stripping Cases

The Dutch dividend withholding tax exemption is denied in so-called dividend-stripping cases (ie, in cases where it appears that the person receiving the dividend is not considered the beneficial owner of the dividend). Dividend stripping may, for example, occur in cases where a shareholder transfers its shares to a third party which is entitled to a more beneficial withholding tax treatment, thereby holding its interest in the shares. Currently, Dutch legislation already contains measures to avoid dividend-stripping, however these rules are currently being reviewed because, in practice, they do not always prove to be effective. A consultation document was published on 15 December 2021 and the Dutch government announced that it will further examine several measures in order to be able to compile rules to more adequately counter dividend stripping. A legislative proposal is expected to be published in spring 2023 (or later this year) and if feasible is envisaged to come into effect as per 1 January 2024. In the view of the Dutch government, dividend stripping could be addressed most effectively in a European and international context. In this regard, the Dutch government noted that the European Commission is currently working on an initiative to improve withholding tax procedures for non-resident investors. A proposal is expected to be published in 2023. The Dutch government welcomes the developments on a European level, also in light of the envisaged steps to strengthen the rules to counter dividend stripping.

In 2020, the first version of an initiative legislative proposal for a conditional final-dividend withholding tax levy emergency act was proposed. The proposal introduced a taxable event (ie, a

DWT exit levy) in case of, for example, a cross-border relocation of the (corporate) tax seat or a cross-border merger of a Dutch company, provided certain conditions are met. In 2022, the Dutch cabinet advised the house of representatives against adopting the initiative legislative proposal. It remains to be seen if, and to what extent, this proposal becomes effective.

Conditional Withholding Tax

As of 1 January 2021, a conditional withholding tax was implemented on interest and royalty payments made to related entities in so-called "low-tax jurisdictions", to hybrid entities and in certain abusive situations. The low-tax jurisdictions are listed in ministerial decree jurisdictions:

- with a profit tax applying a statutory rate of less than 9% (updated annually based on an assessment as per 1 October of the year prior to the tax year); or
- included on the EU list of non-cooperative jurisdictions.

The tax rate is equal to the highest corporate income tax rate (ie, 25.8%). The payer and payee of the interest and royalties are considered to be related where there is a "qualifying interest" (a qualifying interest generally being an interest that provides a controlling influence on the decision-making and activities).

As of 1 January 2024 and like the conditional withholding tax on interest and royalty payments, a conditional withholding tax (equal to the highest corporate income tax rate) on dividends will enter into force, which aims to prevent profit distributions to low-tax jurisdictions, hybrid entities and in certain abusive situations.

4.2 Primary Tax Treaty Countries

The largest foreign investor in the Netherlands is the United States, respectively, followed by the United Kingdom, Germany, Luxembourg and France.. The Netherlands has concluded double taxation treaties with all these countries.

4.3 Use of Treaty Country Entities by Non-treaty Country Residents

So far, the Dutch tax authorities have not in general challenged the use of treaty country entities by non-treaty country residents. Only in the case, for example, where specific anti-conduit rules are breached will the tax authorities challenge such a structure.

Targeting Abuse

It should be noted, however, that in light of the ongoing international public debate on aggressive international tax planning in the context of the G20/OECD, the Inclusive Framework on BEPS and recent case law of the ECJ, the Dutch tax authorities are increasingly monitoring structures and investments more closely and will target those that are perceived as constituting "abuse". In this respect, the importance of business motives, commercial and economic considerations and justification, and relevant substance seems to be rapidly increasing.

From 1 January 2020, the presence of substance will only play a role in the division of the burden of proof between the taxpayer and the Dutch tax authorities. If the substance requirements are met, this will lead to the presumption of "non-abuse", which is respected, unless the tax authorities provide evidence to the contrary. If the substance requirements are not met, the taxpayer is allowed to provide other proof that the structure at hand is not abusive. See **6.6 Rules Related to the Substance of Non-local Affiliates**.

Furthermore, the Netherlands, a member of the Inclusive Framework and a party to the MLI, agrees to the minimum standards included in Articles 6 and 7 of the MLI, which among other things, prohibit the use of a tax treaty by – effectively – residents of third states.

The Dutch government aims to discourage the use of so-called letterbox companies (ie, companies with no or very limited activities that add no value to the real economy). As part of this policy, among others, the Dutch tax authorities are more closely monitoring that companies that claim to be a resident of the Netherlands can indeed be considered as such based on their substance. In 2021, a report on letterbox companies was published, providing an overview on the (mis)use of letterbox companies. The report also contains (tax-related) recommendations, such as extending the possibility to exchange information with other jurisdictions. It is expected that more will be heard about the possible measures to be taken to discourage the use of letterbox companies later in 2023.

4.4 Transfer Pricing Issues

The Dutch tax authorities strictly apply the at arm's length principle as included in Dutch tax law, in Article 9 of most double taxation treaties and elaborated on in the OECD's Transfer Pricing Guidelines, as amended under BEPS. Therefore, transactions between affiliated companies should be at arm's length, while proper documentation should be available to substantiate the at arm's length nature of the transactions.

4.5 Related-Party Limited Risk Distribution Arrangements

The Dutch tax authorities scrutinise that, where a remuneration is based on a certain (limited risk) profile (eg, limited risk distributor), the services and risks of that company indeed match the remuneration. For example, if a limited risk distributor has in fact a stock risk, the remuneration should be increased to reflect coverage of that risk.

4.6 Comparing Local Transfer Pricing Rules and/or Enforcement and OECD Standards

The Netherlands generally follows the OECD's Transfer Pricing Guidelines.

4.7 International Transfer Pricing Disputes

International transfer pricing disputes are, in some cases, resolved through a MAP process. At the end of 2021 there were 458 MAPs outstanding, 169 of which were international transfer pricing disputes. In 2021, 168 MAPs were closed, 59 of which were international transfer pricing disputes. There is no data with respect to international transfer pricing disputes being resolved through double taxation treaties. Generally, the Dutch tax authorities are open to MAPs and willing to co-operate in these procedures. MAPS are becoming more common on the back of more inquiries and disputes in the Netherlands.

In practice, the Dutch tax authorities perform audits during which the transfer pricing methodology applied by a Dutch company is also reviewed for many years.

5. Key Features of Taxation of Non-local Corporations

5.1 Compensating Adjustments When Transfer Pricing Claims Are Settled

Generally speaking, if a transfer pricing claim is settled, the Dutch tax authorities act in accordance with the settlement. Hence, if a downward adjustment of the Dutch income has been agreed, it will in principle be allowed. However, since 1 January 2022, legislation entered into force targeting mismatches resulting from the application of the at arm's length principle. The legislation aims to render the at arm's length principle ineffective in cross-border situations and will, in that respect, deny the deduction of at arm's length expenses, to the extent that the corresponding income is not included in the basis of a local profit tax at the level of the recipient.

5.2 Taxation Differences Between Local Branches and Local Subsidiaries of Non-local Corporations

Local branches (permanent establishments in fiscal terms) are generally taxed on the basis of the same rules and principles as subsidiaries of non-local corporations. However, due to the fundamental difference between a permanent establishment and a legal entity, in practice, differences may occur.

5.3 Capital Gains of Non-residents

Dutch tax law includes so-called substantial shareholding rules that enable taxation of capital gains on shareholdings realised by non-residents of the Netherlands in the case of abuse. Based on the current domestic tax rules, capital gains are taxable if a shareholder holds an interest of at least 5% of the capital in a Dutch BV with the main purpose, or one of its main purposes, being to avoid personal income tax and, in this case, the structure should be considered artificial, having not been created for legitimate business reasons that reflect economic reality.

In the case where the shareholder is resident in a country with which the Netherlands has concluded a double taxation treaty, depending on the content of the specific treaty, the Netherlands may be prohibited from levying capital gains taxation.

5.4 Change of Control Provisions

The change of control due to the disposal of shares by a holding company at a tier higher in the corporate chain (eg, above the Netherlands) as such should, in principle, not trigger corporate income taxation (unless the substantial shareholding rules apply, as referred to in **5.3 Capital Gains of Non-residents**). However, Dutch tax law includes anti-abuse rules that lead to the cancellation of tax losses in the case of a change of control of certain companies (which, broadly speaking, have or are going to have limited activities). Also see 5.3 in relation to capital gains realised on the (indirect) sale of shares in a related Dutch entity.

5.5 Formulas Used to Determine Income of Foreign-Owned Local Affiliates

The Netherlands typically does not determine the income of (foreign-owned) Dutch taxpayers based on formulary apportionment. Instead, remuneration for the rendering of services or the sale of goods between related companies is governed by the at arm's length principle.

5.6 Deductions for Payments by Local Affiliates

Regarding the deduction of cross charges by foreign group companies to the Netherlands, the at arm's length principle is leading. For example, head office charges should be deductible by a Dutch corporate income taxpayer, provided the expenses are at arm's length. It should be noted that in some cases a mark-up is allowed. Cross-charged shareholder costs are not deductible.

5.7 Constraints on Related-Party Borrowing

Other than the interest deduction limitations discussed in **2.5 Imposed Limits on Deduction of Interest**, there are no other/specific rules that particularly constrain the borrowings of a Dutch subsidiary from a foreign subsidiary as such.

As discussed in **4.1 Withholding Taxes**, since 1 January 2021, a conditional withholding tax has applied on interest and royalty payments to related entities in low-tax jurisdictions, to hybrid entities and in certain abusive situations. By 1 January 2024, a conditional withholding tax will also apply in relation to dividends.

6. Key Features of Taxation of Foreign Income of Local Corporations

6.1 Foreign Income of Local Corporations

If a permanent establishment (PE) is recognised to which the assets, risks and functions that generate the foreign income can be allocated, the foreign income should in principle be fully exempt from the Dutch corporate income tax base. It should be noted that currency translation results between the head office and the PE are not exempt.

If certain conditions are met, losses that a PE has suffered on balance may be deductible, provided (among other things) that the losses are not utilised in any way in the PE state by the taxpayer (eg, the head office) or a related entity of the taxpayer. Since 2021, losses resulting from the dissolution of a PE in excess of EUR5 million are generally also limited to EU/EEA situations, quite similar to the rules that apply to participations.

6.2 Non-deductible Local Expenses

As a starting point, the income that is allocated to a PE is determined based on a functional analysis, taking into account the assets, risks and functions carried out by the PE. On the basis of the outcome of the functional analysis, expenses are allocated to the PE and are, as such, exempt (eg, non-deductible) from the Dutch corporate income tax base. Furthermore, in some cases, expenses charged by the PE to the head office in consideration for services provided to the head office by the PE may be ignored. Other than that, there are no specific rules due to which local expenses are treated as non-deductible.

6.3 Taxation on Dividends From Foreign Subsidiaries

Dividend income distributed to a Dutch company is in principle fully exempt if the participation exemption is applicable. The participation exemption should, broadly speaking, be applicable to shareholdings of 5% of the paid-up capital, divided into shares, that are not held as a portfolio investment company. A shareholding should essentially not be held as a portfolio investment if the company has operational activities and has no substantial group financing or group leasing activities, or the company is taxed at an effective tax rate of at least 10% based on Dutch standards.

As mentioned, the Dutch government has investigated whether, with regard to intermediary holding companies with no/low substance, legislation can be introduced to enable the exchange of information with other jurisdictions. The Dutch government has decided (for the time being) not to introduce legislation to enable the exchange of information with other jurisdictions but it cannot be excluded that a new legislative proposal may be issued in this regard. The Dutch rules on exchange of information should in principle be amended as a result of the proposed directive on the misuse of shell entities that was published by the European Commission at the end of 2021 (ATAD 3), of which an amended proposal was approved by the European Parliament in January 2023.

6.4 Use of Intangibles by Non-local Subsidiaries

Group transactions in the Netherlands adhere to the at arm's length principle (including amendments to the transfer pricing guidelines under the BEPS project, such as in relation to hard-to-value intangibles), so the use of locally developed intangibles by non-local subsidiaries should trigger Dutch corporate income taxation.

If the intangibles are going to be developed under the innovation box, the qualifying income (a capital gain or a licence fee) may be taxable at an effective tax rate of 9%.

6.5 Taxation of Income of Non-local Subsidiaries Under Controlled Foreign Corporation-Type Rules

As part of the implementation of the EU Anti-Tax Avoidance Directive, the Netherlands introduced a controlled foreign companies (CFC) regime on 1 January 2019.

Under a somewhat CFC-like rule, in the case of shareholdings of at least 25% in foreign companies that are not taxed reasonably according to Dutch standards and in which the assets of the company are portfolio investments or assets that are not related to the operational activities of the company, the shareholding should be revalued at fair market value annually. The gain recognised as a result of this is subject to corporate income tax at the standard rates. See also **9.1 Recommended Changes.**

Assuming that passive activities led to the recognition of a PE, the income that can be allocated to that PE should not be exempt, as the object exemption is not applicable to low-taxed passive investments.

6.6 Rules Related to the Substance of Non-local Affiliates

In general, no specific substance requirements apply to non-local affiliates (except for the CFC rules). In a broader sense, low substance of non-local affiliates could trigger anti-abuse rules (eg, non-application of the participation exemption due to which inbound dividend income may be taxable, the annual mandatory revaluation of low-substance participations against fair market value, etc).

Furthermore, under certain corporate income tax and dividend withholding tax anti-abuse rules, shareholders of Dutch intermediary holding companies, subject to certain requirements, should have so-called relevant substance and perform relevant economic activities, including that shareholders must use an office space for at least 24 months that is properly equipped to perform holding activities, and wage expenses of at least EUR100,000 should be incurred by the shareholder.

Abuse of EU Law

It must be emphasised that following the CJEU cases of 26 February 2019 on the EU Parent-Subsidiary Directive (PSD, joined cases C-116/16 and C-117/16) and on the Interest and Royalties Directive (IRD, joined cases C-115/16, C-118/16, C-119/16 and C-299/16), the Netherlands, being an EU member state, is obliged to target "abuse of EU law". The assessment of whether a structure or investment may be considered "abusive" is made based on an analysis of all relevant facts and circumstances. There are no legal safe harbour or irrefutable presumptions.

Consequently, from 1 January 2020, the presence of substance will only play a role in the division of the burden of proof between the taxpayer and the tax authorities. If the substance requirements are met, this will lead to the presumption of "non-abuse" which is respected, unless the tax authorities provide evidence to the contrary. If the substance requirements are not met, the taxpayer is allowed to provide other proof that the structure at hand is not abusive.

6.7 Taxation on Gain on the Sale of Shares in Non-local Affiliates

Capital gains derived from the alienation of a qualifying shareholding in a foreign company by a Dutch company are fully exempt from Dutch corporate income tax if the participation exemption is applicable.

7. Anti-avoidance

7.1 Overarching Anti-avoidance Provisions

Apart from specific anti-abuse rules, the Dutch Supreme Court has developed the doctrine of abuse of law (fraus legis) as a general anti-abuse rule. Under this rule, transactions can be ignored or re-characterised for tax purposes if the transaction is predominantly tax-driven and not driven by commercial considerations while the object and purpose of the law are being breached. So far, the Supreme Court has been reluctant to apply the doctrine in cases where a tax treaty is applicable.

As part of the implementation of ATAD, the legislator states that the doctrine of abuse of law (fraus legis) is very similar to the general anti-abuse rule included in the directive, so that effectively no additional provision has to be included in Dutch law in this respect. As a consequence, the fraus legis doctrine must be interpreted in conformity with EU law in certain cases.

8. Audit Cycles

8.1 Regular Routine Audit Cycle

The Netherlands has no periodic routine audit cycle. Tax audits are typically carried out at the discretion of the tax authorities. Tax audits are extraordinary in the sense that the Dutch tax inspector, upon the filing of the corporate tax return, has the opportunity to scrutinise the filed tax return, raise questions, ask for additional information and, if necessary, make an adjustment upon issuing a final assessment.

9. BEPS

9.1 Recommended Changes

Some of the developments that have taken place since the outcomes of the BEPS Project, in chronological order, include the following.

- Following the amendment of the EU Parent-Subsidiary Directive to counter abuse, the Dutch participation exemption regime was amended, due to which, broadly speaking, dividend income is no longer exempt from the Dutch corporate income tax base if the dividend is deductible at the level of the entity distributing the dividend.
- On 12 July 2016, ATAD 1 or the "Directive" was adopted by the European Council, obliging member states to adopt it by 31 December 2018 (subject to certain exceptions). To adopt ATAD 1,the Netherlands implemented a rule, on 1 January 2019, essentially to limit

interest expense deductions to 30% of EBITDA, and also implemented a CFC regime. The "earnings stripping rules" of EBITDA were further tightened from 2022 onwards and are summarised as follows:

(a) The (former) earnings stripping rules limited the deduction of the balance of interest amounts to the highest of 30% of the adjusted profit (*gecorrigeerde winst*) or EUR1 million. As of 1 January 2022, the deduction of the balance of interest amounts was further limited to the highest of 20% of the adjusted profit or EUR1 million.
(b) The Dutch earnings stripping rules are more restrictive than required under the Directive. Thus the Dutch regime does not include a so-called group exemption (that would allow a deduction exceeding the prescribed maximum percentage – 30% in ATAD 1 and currently 20% in Dutch law – of the adjusted taxable profit to the extent that the group's overall debt level exceeds this prescribed maximum percentage), includes a EUR1 million threshold as opposed to the EUR3 million threshold included in the Directive, and also applies in standalone situations (ie, where the taxpayer is not part of a group; this rule was not included in the coalition agreement).
(c) It should be noted that the Dutch government has investigated the implementation of a budget neutral introduction of a deduction on equity, accompanied by the tightening of the Dutch earnings stripping rules, in order to achieve a more balanced tax treatment of capital (equity) and debt. The Dutch government concluded that a unilateral introduction of a deduction on equity is not desirable in respect of tax avoidance and that it should therefore wait for a multilateral introduction of a deduction on equity.

The Netherlands has signed and ratified the MLI that includes the BEPS measures that require amendment of (Dutch) bilateral double taxation treaties. The Netherlands has taken the position that all material provisions of the MLI should be included in the Dutch double taxation treaties, except for the so-called savings clause included in Article 11 of the MLI. As such, a general anti-abuse provision (in most cases, the so-called principal purpose test) should likely be included in many Dutch double taxation treaties, as well as a range of specific anti-abuse rules.

- The Dividend Withholding Tax Act 1965 has been amended whereby co-operatives that are mainly involved in holding and/or financing activities (and that up to now were able to distribute profits without triggering dividend withholding tax except in cases of abuse) become subject to Dutch dividend withholding tax upon distributing profits. If the recipient of the profit distribution is a tax resident in a country with which the Netherlands has concluded a comprehensive double taxation treaty, an exemption from that tax should be available provided that the relevant structure is not abusive. It remains to be seen whether the current rules in place for so-called "non-holding" co-operatives may be amended in the near future. The Corporate Income Tax Act 1969 has also been amended in relation to the above (ie, the substantial shareholding rules).
- A law has been enacted to meet the obligations of the Netherlands in respect of country-by-country reporting (BEPS Action 13).

- A law has been enacted to meet the obligations of the Netherlands in respect of the automatic exchange of rulings. Furthermore, the Dutch innovation box regime has been amended to align it with BEPS Action 5 (countering harmful tax practices).
- Further enhancement of the substance requirements for interest and/or royalty conduit companies has been introduced, due to which, information is automatically exchanged with the respective foreign tax authorities in the case of interest and/or royalty conduit companies not meeting these enhanced substance requirements. These include a minimum of EUR100,000 salary expenses and the requirement that for at least 24 months, properly equipped office space should be available.
- A conditional withholding tax on royalties and interest paid to group companies in low-tax jurisdictions, to hybrid entities or in certain abusive situations applies as from 1 January 2021. As of 1 January 2024, a conditional withholding tax on dividends paid to group companies in low-tax jurisdictions (in line with the conditional withholding tax on interest and royalty payments), to hybrid entities and in certain abusive situations will also apply.
- Double taxation treaties have been and are being renegotiated with 23 developing countries to ensure these tax treaties can no longer be abused, potentially leading to tax budget leakage for the respective developing countries.
- The minimum substance requirements no longer function as a safe harbour.
- The Dutch practice regarding international tax rulings was revised on 1 July 2019. To obtain an international tax ruling from the Dutch tax authorities, among others, a sufficient "economic nexus" with the Netherlands is required.
- The national definition of a permanent establishment is brought in line with the 2017-OECD Model Tax Convention (which reflects the BEPS outcomes).
- Furthermore, the government investigated the extent to which group companies are breaking up (*opknippen*) activities in order to obtain tax benefits, specifically the benefit arising from the multiple application of the low tax rate levied on the first part of a taxpayer's profit. As a result, the first bracket on which Dutch corporate income tax is levied has been lowered (19% over the first EUR200,000 in 2023 instead of 15% over the first EUR395,000 in 2022). In addition, certain tax benefits apply to each individual business unit.

The Dutch CFC regime is summarised as follows:

- The benefits derived from a controlled company are included in the taxable profit of the corporate income taxpayer, taking into account the interest held and the holding period. CFC benefits are defined as interest or other benefits from financial assets; royalties or other benefits from IP; dividends and capital gains upon the alienation of shares; benefits from financial leasing; benefits from insurance, banking and other financial activities; and benefits from certain, low value-adding, factoring activities ("tainted benefits"); less related expenses.
- CFC benefits are only taken into account to the extent that the balance of benefits (ie, income less expenses) results in a positive amount and that balance, by the end of the financial year, has not been distributed by the controlled company. Negative CFC benefits can be carried forward six years to offset against future positive CFC benefits. As of

1 January 2022, the Netherlands introduced a mandatory order to settle foreign taxes by prescribing that first the lowest amount should be settled, followed by the rising amounts. If the amounts to be set off are identical, both amounts should be taken into account pro rata.
- A controlled company is defined as a company in which the taxpayer, whether or not together with related companies or a related person (see below), has an interest of more than 50% (whereby interest is defined in relation to nominal share capital, statutory voting rights and profits of the company), provided that the company is a tax resident in a low-tax jurisdiction or a state included on the EU list of non-cooperative jurisdictions (unless the company is taxed as a resident of another state). A jurisdiction is considered low-tax if it does not levy a profit tax or levies a profit tax lower than 9% (the statutory rate should be at least 9%). Prior to each calendar year, an exhaustive list will be published with all designated non-cooperative and low-tax jurisdictions for the next taxable period (being the next calendar year). A permanent establishment can also qualify as a CFC.
- For purposes of the CFC regime, a company or person is related to the taxpayer if the taxpayer has a 25% interest in the company or the company or that person has a 25% interest in the taxpayer (whereby interest is again defined in relation to nominal share capital, statutory voting rights and profits of the company).
- A company is not considered a controlled company if at least 70% of the income of the company does not consist of tainted benefits or the company is a regulated financial company as defined in Article 2(5) of the Directive and at least 70% of the benefits earned by the company are not derived from the taxpayer, a related entity or a related person.
- The CFC regime does not apply if the controlled company carries out material (*wezenlijk*) economic activities. According to the explanatory memorandum, material economic activities are considered present if the relevant substance requirements that are currently already included in the anti-abuse provisions in the Dutch Dividend Withholding Tax Act 1965 (DWT) are met. Most importantly, the controlled company will need to incur annual wage costs of at least EUR100,000 for employees and the controlled company will need to have its own office space at its disposal in the jurisdiction where it is established during a period of at least 24 months, during which, this office space needs to be properly equipped and used. Furthermore, the employees must have proper qualifications and their tasks should not be merely auxiliary. Since 1 January 2020, the presence of substance has only played a role in the division of the burden of proof between the taxpayer and the tax authorities. If the substance requirements are met, this will lead to the presumption of “non-abuse” which is respected, unless the tax authorities provide evidence to the contrary. If the substance requirements are not met, the taxpayer is allowed to provide other proof that the structure at hand is not abusive. See **6.6 Rules Related to the Substance of Non-local Affiliates**.

9.2 Government Attitudes

The central attitude of the Dutch government is to find a balance between, on the one hand, ending international aggressive tax planning by promoting transparency and making rules abuse-proof, and, on the other hand, not harming the Dutch economy and thus seeking to take measures on an international level to avoid unilateral measures that would disproportionately harm Dutch corporations and to establish favourable Dutch tax regimes to safeguard the attractive business and investment climate.

The Dutch government has announced that it will fully commit to the rules of Pillar One and Pillar Two. Pillar One may substantially impact the allocation of tax revenues to jurisdictions. As the EU member states have reached agreement on Pillar Two, it should furthermore be noted that Pillar Two may substantially impact the sovereignty of states as regards the taxation of business profits and their ability to employ an international tax policy based on the principle of "capital import neutrality". In addition, the implementation of Pillar Two will most likely lead to a higher administrative burden as the effective tax rate should be determined in each jurisdiction in which a multinational is active. EU member states should implement Pillar Two in their national legislation as of 1 January 2024. The Dutch government published a draft bill and explanatory notes for public consultation on the implementation of Pillar Two in the Netherlands in October 2022.

9.3 Profile of International Tax

International taxation, especially over the last decade, has gained a high public profile due to extensive coverage of – alleged – aggressive tax planning in leading Dutch newspapers and other media, as well as the exposure generated by NGOs such as Oxfam Novib and Tax Justice.

Over the last decade, members of parliament have raised their concerns on a regular basis regarding the attitude of multinational corporations and their supposed unwillingness to contribute their fair share. This is, for example, also reflected in the notifications made by the Dutch government for the application of the MLI, which reflect the Dutch position to apply nearly all anti-abuse measures included in the MLI.

9.4 Competitive Tax Policy Objective

The Netherlands has a competitive tax policy, driven by the fact that the Dutch economy relies for a large part on foreign markets, as the domestic market is relatively small. In a letter from October 2022, the Dutch government sets out its (updated) international tax policy. As a starting point, the Dutch government considers it to be important that the Netherlands is not out of line with other countries when it comes to the area of taxation. For that reason, the approach of tax avoidance should be accompanied by (satisfactory) international agreements. At the same time, the Dutch government strives for a stable tax business climate in which tax legislation does not change every few years. When implementing new legislation for corporate entities, the Dutch government is seeking to find a balance between mitigating the risk of abuse by international taxpayers while avoiding unnecessary hindrance of real corporate activities.

9.5 Features of the Competitive Tax System

The Dutch government generally takes a balanced approach for each measure, therefore consideration will be given to the pros and cons of existing practices, and the relevance for real business activities, including the accounting and legal services industry. Thus, it is difficult to say which areas are vulnerable to scrutiny, except for structures with low substance and structures that are clearly tax driven while bearing little or no relevance for the real economy. Dutch law does not restrict state aid in general with a specific rule, except for the state aid rules as laid down in EU law.

9.6 Proposals for Dealing With Hybrid Instruments

The proposals addressing hybrid instruments have been implemented by the Dutch government and as such are included in Dutch tax law and/or Dutch double taxation treaties. This applies to the measures taken as part of BEPS, as well as the extension of ATAD.

9.7 Territorial Tax Regime

The Netherlands has no territorial tax regime. As a starting point, it taxes resident (corporate) taxpayers on their worldwide income, subject to the application of double taxation treaties and unilateral rules for relief for double taxation.

It is difficult to make a general prediction as to the impact of the interest limitation rules for Dutch taxpayers, as this is to a large extent fact driven, while the Netherlands already has a range of interest limitation rules and it has been proposed to abolish two of the existing interest limitation rules.

9.8 Controlled Foreign Corporation Proposals

A cornerstone of Dutch international policy for decades has been to avoid economic double (including juridical double) taxation within corporate structures, which is why the Netherlands has exempted dividend income received from foreign group companies (under the so-called participation exemption regime). Furthermore, the Netherlands has so far been advocating the principle of so-called capital import neutrality, by which a resident state should exempt foreign-sourced income from taxation to allow its corporations to make foreign investments on a level playing field (in terms of taxation).

The Netherlands therefore used to be reluctant to let go of its position to exempt foreign income. As a matter of fact, former proposals to include a so-called switch-over provision (whereby exemption of taxation is basically replaced by a tax credit for certain types of income) were strongly and successfully opposed by the Dutch government. However, as part of the implementation of the ATAD, CFC rules were introduced in the Netherlands on 1 January 2019. See **9.1 Recommended Changes**.

9.9 Anti-avoidance Rules

The Netherlands favours (as reflected in the Dutch notification to Article 7 of the MLI) a principal purpose test as opposed to a limitation on benefits provision, mainly because the principal purpose test is considered to work out proportionately in most situations. Thus, truly business-driven structures, either inbound or outbound, should not be harmed. Nevertheless, the principal purpose test is principle driven rather than rule driven, which makes it less clear which structures will be affected by the principal purpose test.

In other words, there may be legal uncertainty, especially in the beginning when there is also little practical experience. Furthermore, some countries might apply the principal purpose test liberally, which might make corporations decide to avoid the Netherlands. However, this remains to be seen, especially as in other countries the same issues should come up. The potential impact of EU law in this respect is subject to debate.

9.10 Transfer Pricing Changes

Aside from the introduction of country-by-country reporting and, to a lesser extent, the documentation requirements (eg, master file and local file), the Netherlands has already applied the at arm's length principle as a cornerstone of its transfer pricing regime. As such, these changes should not lead to a radical change, and this should also apply to intangibles.

However, as stated before, legislation that entered into force on 1 January 2022, targeting mismatches resulting from the application of the at arm's length principle, which among other things, aims to render the arm's length principle ineffective between related parties in cross-border situations to the extent that it will deny the deduction of at arm's length expenses if the corresponding income is not included in the basis of a local profit tax at the level of the recipient.

9.11 Transparency and Country-by-Country Reporting

The Netherlands is in favour of increasing transparency in international tax matters, provided an agreement can be reached on an international level that is as broad as possible to avoid national economies being harmed by MNCs' decisions to avoid jurisdictions that have transparency requirements.

9.12 Taxation of Digital Economy Businesses

No legislative proposals have been published in this area yet.

9.13 Digital Taxation

The State Secretary for Finance favours an international, co-ordinated (unified) approach, rather than jurisdictions implementing domestic legislation independently, such as Pillar One and Pillar Two. Consequently, the Dutch government has announced that it will fully commit to the rules of Pillar One and Pillar Two. As stated before, EU member states have reached agreement on Pillar Two. Consequently, EU member states should implement Pillar Two in their national legislation as of 1 January 2024. The Dutch government already published a draft bill and explanatory notes for public consultation on the implementation of Pillar Two in the Netherlands in October 2022.

It should also be noted that as of 1 January 2023, the Directive on Administrative Cooperation (DAC7) has been implemented into Dutch law. DAC7 contains rules on the information exchange of digital platforms.

9.14 Taxation of Offshore IP

The Netherlands has no specific provisions as to the taxation of offshore intellectual property. It is worth noting however that, since 1 January 2021, a conditional withholding tax has applied to interest and royalty payments to states qualified as low-tax jurisdictions. Furthermore, in the case of passive offshore IP structures, the Dutch CFC rules may apply.

Stibbe handles complex legal challenges, both locally and cross-border, from its main offices in Amsterdam, Brussels and Luxembourg as well as branch offices in London and New York. By understanding the commercial objectives of clients, their position in the market and their sector or industry, Stibbe can render suitable and effective advice. From an international perspective, Stibbe works closely with other top-tier firms on cross-border matters in various jurisdictions. These relationships are non-exclusive, enabling Stibbe to assemble tailor-made integrated teams of lawyers with the best expertise and contacts for each specific project. This guarantees efficient co-ordination on cross-border transactions throughout a multitude of legal areas, irrespective of their nature and complexity.

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