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## Proposed new Tax Arrangement between the Netherlands and Curaçao submitted to the Dutch House of Representatives

*This proposed new Tax Arrangement between the Netherlands and Curaçao (“TANC”) will replace the current Tax Arrangement for the Kingdom of the Netherlands (“TAK”).*

### *Background*

Since 10 October 2010, when the Netherlands Antilles were dissolved, Curaçao is a constituent country of the Kingdom of the Netherlands<sup>1</sup>. On 12 December 2011, the Dutch Ministry of Finance announced that the Netherlands and Curaçao had reached an agreement in headlines on a new bilateral tax arrangement for the avoidance of double taxation which should replace the current multilateral tax arrangement for the Kingdom of the Netherlands in relation between the Netherlands and Curaçao. As a result of the changes in October 2012 the TANC indicates that it is also applicable between Curaçao and Bonaire, Saint Eustatius and Saba. However, it is not applicable to Aruba and Sint Maarten. The current TAK (“Belastingregeling voor het Koninkrijk”) will remain applicable between the Netherlands and Aruba and between the Netherlands and Sint Maarten.

On 10 June 2014, the bill to implement to TANC submitted to the Dutch House of Representatives was published. The TANC will enter into force on 1 January following the year of ratification in the Netherlands and Curaçao. It is expected that the ratification will take place this year. Therefore, it is expected that the TANC will enter into force as per 1 January 2015. The TANC is based on the OECD Model Tax Convention.

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<sup>1</sup> Bonaire, Saint Eustatius and Saba became “special counties” of the Netherlands in October 2010. A separate arrangement for the avoidance of double taxation applies between the Netherlands and these territories.

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### *Headlines on taxation of dividend and dual residency*

- ✓ In addition to a withholding tax rate on dividends of 15%, for active companies there will be a 0% rate on dividends from ( $\geq$  10%) participations;
- ✓ A so called limitation on benefits (“LOB”) clause will be introduced for the 0% rate. The LOB clause is comparable to LOB clauses in other treaties recently concluded by the Netherlands (i.e. Japan). Under the LOB clause the 0% rate on dividends will apply:
  1. To dividends of which the beneficial owner is a) a qualifying entity and holds at least 10% of the capital of the entity paying the dividends, b) the Netherlands or Curaçao or part of the respective countries, and c) pension funds;

A qualifying entity is:

    - i) an entity that meets the included direct or indirect stock exchange test;
    - ii) an entity which qualifies as a headquarters in which case it, inter alia, should conduct business activities in at least five countries and at least 10% of the gross income of the overall group should be derived from each of these countries;
    - iii) an entity that provides fulltime jobs for at least 3 resident employees, who are independently managing the activities, assets and income of the entity and are authorized and responsible to do so.
  2. To dividends of which the beneficial owner is an active enterprise (certain activities are excluded, inter alia, financing, insurance and trading activities by banks, insurance companies or brokers) in its state of residence, holding at least 10% of the capital of the entity paying the dividends.
  3. To dividends of which the beneficial owner is an entity of which not one or its main purposes was to qualify for the 0% rate and which has applied for this exemption. According to the Explanatory Memorandum, this is considered to be the case if a) the shareholding can be attributed to a business enterprise of the entity and b) the entity meets certain minimum substance requirements.
  4. To dividends of which the beneficial owner is an entity that is directly or indirectly held by at least 50% individuals resident in one of the two countries and holds at least 10% of the capital of the entity paying the dividends.
- ✓ The definition of ‘dividends’ now also includes repurchase of shares and liquidation proceeds. These are not included in the TAK;

- ✓ If the conditions of the LOB clause are fulfilled, the non-resident corporate income tax rules on income from  $\geq 5\%$  participations in Dutch companies (article 17(3)b Dutch Corporate Income Tax Act (“CIT Act”)) will not be applied;
- ✓ Existing participations of at least 25% which do not qualify for the 0% rate will be subject to 5% until – at the latest – the end of 2019. If the 5% rate can be applied, the non-resident corporate income tax rules on income from  $\geq 5\%$  participations in Dutch companies (article 17(3)b CIT Act) will not be applied;
- ✓ If a company or legal person is considered a resident of both countries, the competent authorities shall settle the status of the company by mutual agreement. According to the Explanatory Memorandum, this “corporate tiebreaker” is introduced to avoid that Dutch companies will be transferred to Curaçao for tax reasons only, for example in those cases where the 0% rate on dividends does not apply. It is not intended to investigate existing structures.

### *Other relevant items of the new tax arrangement*

- ✓ When providing services in the other country for a longer period of time (> 183 days), a permanent establishment can exist even if there is no fixed place of business;
- ✓ Up to 10 years after emigration of an individual to Curaçao, the Netherlands can levy 25% tax on dividends and capital gains from shares in which the individual holds a substantial shareholding (i.e. at least 5% of the shares). Dutch citizens who are already tax residents of Curaçao are grandfathered (current 5 years term and 15% rate will remain applicable);
- ✓ A shared right to levy tax will apply to non-government pensions, with a 15% source state taxation, in combination with a grandfathering (exclusive residence state taxation) for existing pension benefits for Dutch citizens who are already tax residents of Curaçao;
- ✓ Gift and inheritance tax can be levied by the Netherlands up to five years after emigration to Curaçao, in combination with a grandfathering (one year after emigration) for Dutch citizens who are already tax residents of Curaçao;
- ✓ Both countries are allowed to apply their domestic anti-avoidance rules to levy tax in order to combat tax avoidance, except for the non-application of the non-resident corporate income tax rules on income from  $\geq 10\%$  participations in Dutch companies qualifying for the 0% rate and from  $\geq 25\%$  participations in Dutch companies qualifying for the 5% rate;
- ✓ A mutual agreement procedure with the possibility of (binding) arbitration;

- ✓ An exchange of information provision in accordance with the international standard. Curaçao has the intention to start automatic exchange of information under the EU Savings Interest Directive in a later stage.

### *Preliminary views on the most important features*

In line with our preliminary views on the announced headlines of the TANC for the Kingdom, in our view, the most appealing features of the TANC are:

1. The introduction of a 0% rate on dividends from  $\geq 10\%$  Dutch participations to Curaçao corporate shareholders, subject to the introduction of the limitation on benefits clause "LOB";
2. The (temporary) reduction from 8.3% to 5% on dividends from  $\geq 25\%$  Dutch participations to Curaçao corporate shareholders not qualifying for the 0% rate;
3. The non-application of the non-resident corporate income tax rules on income from  $\geq 10\%$  participations in Dutch companies qualifying for the 0% rate and from  $\geq 25\%$  participations in Dutch companies qualifying for the 5% rate.

Given the contents of the LOB provision, there are several possible opportunities to qualify for the 0% rate in cases where not one of the main purposes of the parties was to qualify for the 0% rate.

The reduction of the 8.3% rate is a welcome improvement to many existing legal structures currently still suffering 8.3%. For these structures it is recommended, if possible, to defer dividend distributions until after the TANC has entered into force, which is expected to be 1 January 2015.

The Dutch non-resident corporate income tax rules are aimed mainly at taxing foreign shareholders individuals structuring their passive investments through Dutch holding companies, making use of the extensive Dutch tax treaty network and the generous participation exemption (but in certain circumstances might also affect corporate taxpayers). Article 35a of the current TAK specifically allows for the application of domestic anti abuse provisions. The non-application of these Dutch non resident corporate income tax rules once the TANC has entered into force should be a welcome improvement particularly to high net worth individuals (resident outside the Netherlands and Curaçao) who have structured their passive investments (outside the Netherlands and Curaçao) through a Curaçao/Netherlands holding company structure. In other words, although Dutch dividend withholding tax is still to be taken into account, the sale of a Dutch holding company by a Curaçao (top) holding company will no longer be subject to Dutch non resident corporate income tax.

Since the TANC is said to be based on the OECD Model Convention, it can be expected that after the TANC has entered into force, which is expected to be 1 January 2015, the sale of a Dutch holding company by a Curaçao (top) holding company should be protected from Dutch non resident corporate income tax under the capital gains article in the TANC.

Dutch citizens who are already tax residents of Curaçao are grandfathered, inter alia, with respect to the extension of the period to levy tax on dividends and capital gains from shares in which an individual holds a substantial shareholding, taxation of non-government pensions and extension of the period to levy gift and inheritance tax. Currently it is unclear whether these Dutch citizens should have been tax resident of Curaçao before 5 June 2014 or before 10 June 2014. The royal message of the Dutch King submitted to the Dutch House of Representatives to which the bill was attached is dated on 5 June 2014. However, the letter of the Dutch minister of finance in which he request the Dutch King to submit the bill to the Dutch House of the Representatives is dated on 10 June 2014.