Headlines of the new Tax Arrangement for the Kingdom announced
Non-resident corporate income tax abolished?

On 12 December 2011, the Dutch Ministry of Finance announced the headlines of the upcoming new Tax Arrangement for the Kingdom of the Netherlands ("TAK"). The TAK provides for avoidance of double taxation on income and capital between the Netherlands and Curacao[1].

Unofficial translation of the announcement from the Ministry of Finance

Introduction

Curacao and the Netherlands have reached an agreement in headlines on a new bilateral arrangement for the avoidance of double taxation (TAK) between both countries. This arrangement should become effective 1/1/2013 and has been based on the OECD Model Convention.

Headlines new TAK and application article 35a of the current TAK

- Gift and inheritance tax can be levied by the source country up to five years after emigration, subject to credit of taxation in the (new) residence country (secondary right to levy tax);

- An exchange of information provision in accordance with the international standard, whereby Curacao considers to start automatic exchange of information under the EU Savings Interest Directive;

- In addition to a withholding tax rate on dividends of 15%, for active companies there will be a 0% rate on dividends from (>/= 5%) participations. A so called limitation on benefits clause will be introduced (OHP: for the 0% rate)[2];

- 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;

- In 2012, in anticipation of the new TAK, article 35a of the current TAK (OHP: a provision explicitly allowing the application of anti abuse measures in the domestic tax laws) will not be applied in respect of article 17(3)b Dutch corporate income tax (non-resident corporate income tax on dividends capital gains from >/= 5% participations in Dutch companies), meaning that the latter article will not be applied;

- 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 Curacao;

- A mutual agreement procedure with the possibility of (binding) arbitrage;

- Agreements on trade and transit of goods from Curacao to the Caribbean part of the Netherlands are addressed.

[1] Bonaire, Saint Eustatius and Saba became "special counties" of the Netherlands in October 2010. A separate arrangement for the avoidance of double taxation applies / will apply between the Netherlands and these territories.
[2] Curacao does not levy dividend withholding tax. These provisions are relevant for distributions from the Netherlands to Curacao.

Preliminary views on the ramification of the most important provisions

In our view, the most appealing new provisions announced are:

1 The introduction of a 0% rate on dividends from >/= 5% Dutch participations to Curacao 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 >/= 25% Dutch participations to Curacao corporate shareholders not qualifying for the 0% rate;

3 The non application of the non-resident corporate income tax on dividends capital gains and interest from >/= 5% participations in Dutch companies in 2012.

The possible opportunities from the 0% rate can only be addressed once the contents of the LOB provisions are disclosed by the Ministry of Finance.

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 1 January 2013.

The Dutch non-resident corporate income tax is 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). Pursuant to the 2012 Budget Plan, this provision will be amended to reflect that it is an anti abuse provision. Article 35a of the current TAK specifically allows for the application of domestic anti abuse provisions.

The non-application of the Dutch non resident corporate income tax in 2012 should be a welcome improvement particularly to high net worth individuals (resident outside the Netherlands and Curacao) who have structured their passive investments (outside the Netherlands and Curacao) through a Curacao/Netherlands holding company structure: although Dutch dividend withholding tax is still to be taken into account, based on the announcement in 2012 the sale of a Dutch holding company by a Curacao (top) holding company will no longer be subject to Dutch non resident corporate income tax.

Since the new TAK is said to be based on the OECD Model Convention, it can be expected that after 2012, the sale of a Dutch holding company by a Curacao (top) holding company should be protected from Dutch non resident corporate income tax under the capital gains article in the new TAK.

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