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Inward Investment And International Taxation

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In-Depth: Inward Investment and International Taxation (formerly The Inward Investment and International Taxation Review) is a practical overview of the business tax regimes in key jurisdictions worldwide, with a focus on the implications for international organisations seeking to expand into new markets. It offers topical and current insights on the most pressing tax issues and opportunities, including those relating to fiscal residence rules, business holding structures and cross-border activity.

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Netherlands

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Introduction

The Netherlands is often considered a gateway to Europe for global companies and investors. Key elements of recognitions are the participation exemption and network of tax treaties concluded by the Netherlands, along with the possibility to obtain certainty by advance tax rulings (ATRs) and advance pricing agreements (APAs), the extensive Dutch bilateral investment treaties and the flexible corporate law.

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Common forms of business organisation and their tax treatment

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i Corporate

Limited liability companies

In the Netherlands, there are two alternatives when incorporating a Dutch limited liability company, being (1) the private limited liability company (BV) and (2) the public limited liability company (NV). Both the BV and the NV have legal personality and are solely liable for their liabilities. Furthermore, both have a capital that is divided into shares. Generally speaking, NVs are typically used for companies going public, and BVs in most other cases due to the flexibility of the governing laws.

NVs and BVs are considered to be Dutch tax residents by virtue of being incorporated under Dutch law (the 'incorporation fiction'). As Dutch tax resident companies, both are generally subject to Dutch corporate income tax (CIT) on their worldwide income, with a branch exemption and participation exemption regime to eliminate international double taxation. Dividend distributions made by NVs and BVs are subject to Dutch dividend withholding tax (DWHT) where there are profits, with reductions and exemptions that could be applicable based on domestic law or the application of a tax treaty.

Cooperative

The Dutch cooperative is a special form of an association. A Dutch cooperative must have a board of directors and members and, if included in the articles of association, a

supervisory board. Furthermore, the cooperative regime is quite flexible as no minimum capital requirements apply, only at least two members are required and dividends may be distributed freely. Dutch law dictates that a cooperative's objective must state that it provides for specific material needs of its members pursuant to agreements that are not insurance contracts and that have been concluded with those members as part of the cooperative's business or causes that benefit the members.

Generally, the Dutch CIT rules also apply to Dutch cooperatives, meaning that these are also subject to Dutch CIT on their worldwide income. Cooperatives have in principle no withholding obligation for DWHT purposes. However, cooperatives of which the main (70 per cent or greater) activities consist of holding participations or intercompany financing and where the dividend distributions are made to qualifying members (holding 5 per cent or more) are in principle subject to DWHT.

ii Non-corporate

Next to the limited liability companies and cooperative, Dutch law also provides for some forms of partnerships. Partnerships are formed by means of a partnership agreement that governs the cooperation between two or more partners. A Dutch partnership is not a separate legal person but is able to sue and be sued and to enter into contracts in its own name.

There are two forms of the Dutch partnership, namely (1) a general partnership (VOF); and (2) a limited partnership (CV). The primary distinction among these partnership forms lies in their rights of representation and the liability of the partners. It is important to note that in a general partnership (VOF) and for general partners in a limited partnership (CV), liability is unrestricted, whereas for limited partners in a CV the liability is limited to the amount of their individual capital contributions.

For Dutch tax purposes, there has been a distinction between 'open' and 'closed' CVs. An open CV has been regarded as non-transparent (opaque) for Dutch tax purposes and is therefore considered a taxpayer for Dutch tax purposes. On the other hand, closed CVs are transparent for Dutch tax purposes. A look-through approach applies to these closed CVs, meaning that only the limited partners in the CV may be subject to tax. The 'consent requirement' is a crucial factor in determining whether a CV is regarded as an open or a closed CV. In short, this requires that the admission and substitution of limited partners is subject to the prior unanimous consent of all (i.e., both limited and general) partners. This consent requirement is unique in the world and has led to hybrid mismatches in international structures containing partnerships. In view of this, new legislation regarding the open CV and the tax classification of foreign partnerships will enter into force as of 1 January 2025. This includes among other things the abolishment of the open CV, making all Dutch CVs by definition become transparent for Dutch tax purposes. Specific transitional measures entered into force on 1 January 2024 to facilitate tax-neutral rollovers for latent capital gains embedded in interests in Dutch limited partnerships, whose Dutch tax treatment changes due to the new rules.

Direct taxation of businesses

Dutch CIT is levied on Dutch and non-Dutch tax residents. Dutch tax residents are in principle subject to Dutch CIT on their worldwide income. Non-residents are subject to Dutch CIT only insofar as they earn Dutch-source income, which falls into two categories:

1. taxable profits derived from a business that is conducted through a permanent establishment (PE) or a permanent representative in the Netherlands (Section IV.ii); or
2. taxable income derived from a substantial interest in a company that is a resident of the Netherlands, provided that:
    - the main purpose (or one of the main purposes) for holding the interest is to avoid Dutch personal income tax in the hands of another person (subjective test); and
    - the holding of the shares in the Dutch resident company is part of an artificial arrangement or transaction (or a series of artificial arrangements or composite of transactions), which will be the case if there are no valid business reasons reflecting economic reality (objective test).

The determination of whether an arrangement has been established for valid commercial reasons may depend on the substance at the shareholder level. Valid commercial reasons may exist if, inter alia: (1) the shareholder is actively engaged in a significant business enterprise, and the shareholding forms a part of the assets of that business; (2) the shareholder functions as a key holding company, undertaking substantial management, policy, and financial functions for the group; or (3) the shareholder serves as an intermediate holding company within the group structure.

As of 1 January 2020, the Dutch substance rules have been revised. If an intermediate holding company meets the Dutch minimum substance requirements, including the wage sum criterion (typically involving a wage sum of €100,000) and the office space criterion (maintaining office space for at least 24 months), the burden of proof regarding the purpose for holding the interest and the absence of valid commercial reasons reflecting economic reality shifts to the tax inspector. However, if the specified substance requirements are not fulfilled, the taxpayer is required to substantiate that holding the interest is not primarily aimed at avoiding Dutch personal income tax at the level of the ultimate individual shareholder, either as the main purpose or one of the main purposes in the hands of another person or that the structure is based on valid commercial reasons that reflect the economic reality.

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i Tax on profits

Determination of taxable profit

Dutch CIT is imposed on a taxpayer's taxable profit, calculated yearly by deducting deductible losses and costs from the net income earned, including any capital gains realised. This computation follows the principles of sound business practice and has been extensively elaborated in Dutch case law. Profits and losses are allocated to respective years based on principles such as realisation, matching, reality, caution and simplicity. Generally, all legitimate business expenses, including interest on loans (subject to interest deduction limitation rules), as well as annual amortisation and depreciation on assets utilised for the taxpayer's business, are eligible for deduction from the taxable profit.

Capital and income

See under the previous header 'Determination of taxable profit.

Losses

As of 1 January 2022, the possibility to offset losses in the Dutch CIT has been made indefinite, but the amounts that can be offset in a certain year may be limited. Taxable profits up to €1 million can be offset against available taxable losses, but taxable profits exceeding this threshold of €1 million can only 50 per cent offset against taxable losses. Any losses that are not taken into account due to this limitation can be carried forward indefinitely.

The utilisation of losses that have come up before a substantial change of ownership (i.e., exceeding 30 per cent) is typically restricted, except in cases where the business activities have not significantly decreased since the year when the oldest loss was reported. In instances of subsequent changes in ownership, consideration must be given to prior shareholder alterations, commencing from the earliest year in which losses are still not fully offset.

Rates

The standard Dutch CIT rate remained the same in 2024 as it was in 2023 with 25.8 per cent. The first €200,000 of annual taxable profit is subject to Dutch CIT against a reduced rate of 19 per cent.

Administration

Companies are required to submit their CIT returns within five months of the end of the financial year. One means of requesting an extension is by joining a tax adviser firm's extension programme.

Dutch taxpayers can opt to file their returns using a functional currency, which refers to a foreign currency other than the euro, provided that their annual reports are prepared in the same foreign currency. This arrangement enables Dutch taxpayers to mitigate the impact of fluctuations between the euro and the functional currency on taxable profits, such as foreign exchange results related to outstanding debt or receivables. To opt for a functional currency, a functional currency decision should be obtained from the Dutch tax authority.

Tax grouping

The Dutch Corporate Income Tax Act 1969 (CITA) provides the opportunity to include multiple companies into a CIT fiscal unity if certain conditions are met. As a consequence of the CIT fiscal unity, the companies will collectively be considered one single taxpayer for CIT purposes and only one CIT returns will need to be filed. Therefore, all assets and liabilities will be consolidated and internal transactions will in principle not be visible. The CIT is imposed on the parent company of the CIT fiscal unity, but all subsidiaries included in the CIT fiscal unity are jointly and severally liable for any tax liabilities.

To qualify for the application of the CIT fiscal unity regime, it is required that a parent company holds at least 95 per cent of the legal and economic title to the shares of the subsidiary that is envisaged to be included in the fiscal unity. The formation of a CIT fiscal unity is not mandatory, but companies have the possibility to opt for an inclusion in a CIT

fiscal unity. A CIT fiscal unity can be requested retrospectively within a maximum period of three months.

In the beginning of 2018, the Court of Justice of the European Union (CJEU) ruled that the Dutch CIT fiscal unity infringed the European freedom of establishment and the Netherlands should apply a 'per-element approach'. In response to the CJEU's judgment, the Dutch State Secretary of Finance implemented emergency repair measures with retroactive respect in Dutch law. Based on these emergency repair measures, the regime of the Dutch CIT fiscal unity changed. In short, several provisions included in the Dutch CITA and Dutch Dividend Withholding Tax Act 1965 (DWTA) must be applied as if the CIT fiscal unity does not apply since the implementation of the emergency repair measures.

Given the foregoing, the Dutch CIT fiscal unity regime is currently under review and may be replaced by a group relief or group contribution regime. The Dutch government is currently still reviewing the alternatives with respect to the future of the Dutch CIT fiscal unity regime.

ii Other relevant taxes

VAT

Value added tax is applied to the provision of goods and services in the Netherlands, guided by the EU VAT Directives. The standard VAT rate is set at 21 per cent. A reduced rate of 9 per cent is applicable to specific supplies, and a zero per cent rate is assigned to transactions linked to international trade. Additionally, the Netherlands incorporates various VAT exemptions, exempting certain transactions from VAT.

In line with the Dutch VAT Act, a deferment system is established for VAT, requiring taxpayers to report import VAT in their periodic tax returns while simultaneously deducting it. This approach ensures that, on balance, no actual payment of VAT is made.

Excise duties and import duties

Excise duties are mainly levied on alcoholic products, tobacco, and mineral oil products. Import duties are levied on various imported products with their origins outside the European Union. The Netherlands does not impose export duties.

Real estate transfer tax

The transfer of legal or economic ownership of real estate situated in the Netherlands is subject to a real estate transfer tax (RETT) against a rate of 10.4 per cent. If the buyer of the real estate property will actually live in the property on a long-term basis (i.e., no holiday homes or buy-to-let properties) then the buyer will be eligible for the lower RETT rate of 2 per cent. Certain exemptions may be applicable in cases involving mergers or reorganisations, or when the transfer is also subject to VAT.

Additionally, the acquisition of shares in a real estate company, defined as a company where real estate assets constitute over 50 per cent of total assets, with at least 30 per cent being real estate located in the Netherlands, is also subject to Dutch RETT.

Dutch payroll taxes

The Dutch payroll taxes (PT) consist of two parts, the Dutch wage tax and social security contributions. A company that employs one or more Dutch employees has a withholding obligation for the Dutch PT. Therefore, employers must withhold both wage tax and social security contributions on any salary payments. It is noted that for the Dutch social security contributions a maximum wage of €71,628 (2024) applies. The PT return must be filed within one month of the relevant taxation period, and any PT amount due must be paid ultimately at the end of that taxation period.

Highly skilled migrant workers have a special tax facility available to them, the 30 per cent ruling. This ruling enables the employer to provide up to 30 per cent of the employee's gross annual salary tax-free, to compensate them for the extraterritorial costs incurred with maintaining lives in multiple countries for up to five years. The 30 per cent ruling can be applied if the employee has been recruited or assigned from abroad, possessing specific expertise that is scarce in the Dutch labour market.

As of 1 January 2024, amendments have been made to the 30 per cent ruling. The maximum gross annual salary on which the 30 per cent ruling can be applied to, is currently capped at €233,000. Another change as of 1 January 2024 is that the tax benefit of the 30 per cent ruling will be reduced over the five-year term. In the first 20 months of application, 30 per cent of the salary can be provided tax-free. This rate will be reduced to 20 per cent in the following 20 months, and to 10 per cent in the final 20 months. It is noted that the Dutch cabinet formation is still going on, and, depending on the final cabinet, these amendments may be reversed.

Tax residence and fiscal domicile

i Corporate residence

Under Dutch tax law, tax residency should be determined according to the specific facts and circumstances. In general, a company is considered to be a resident of the Netherlands when the place of effective management is located in the Netherlands.

However, the Dutch CITA includes the 'incorporation fiction'. This fiction entails that any company incorporated under Dutch law will be considered a tax resident of the Netherlands for Dutch tax purposes. Therefore, any BV or NV is in principle subject to Dutch CIT. If another country takes the position that the BV or NV is tax resident of that country, the applicable tax may allocate the tax residency to that other country.

ii Branch or permanent establishment

Taxable profits arising from a business conducted through a PE or a permanent representative in the Netherlands are generally subject to CIT. The Dutch CITA refers to the relevant tax treaty for the definition of a PE, or, where no tax treaty is available, provides the definition of a PE. The CITA explicitly includes the following within the scope of a Dutch business:

1. income and gains derived from real estate situated in the Netherlands, including direct and indirect rights in Dutch real estate, as well as rights to explore and commercially operate Dutch natural resources;
2. profit-sharing rights or entitlements to the net value of a business effectively managed in the Netherlands, excluding those derived from securities;
3. receivables on companies resident in the Netherlands, if the lender holds a substantial interest in the concerned company; and
4. sctivities performed by a member of the management or supervisory board of a Dutch resident company, even if the authority is confined to parts of the business located outside the Netherlands.

In determining the profits attributable to a PE, the Netherlands adheres to the authorised approach of the Organisation for Economic Cooperation and Development (OECD), which was predominantly incorporated into the Dutch PE profit allocation decree of 2011.

Tax incentives, special regimes and relief that may encourage inward investment

i Holding company regimes

Under the Dutch participation exemption regime, all benefits, including dividends and capital gains, derived from a qualifying participation in another company are exempt from CIT at the level of the parent company.

To be eligible for the Dutch participation exemption, two key conditions must be satisfied. The first condition is that the Dutch company must hold at least five per cent of the nominal paid-up share capital of a company with capital divided into shares. The second condition is that the company in which the Dutch company holds a participation should not be considered a portfolio investment, defined as the 'motive test'.

The motive test ensures that the exemption applies to genuine business activities rather than passive investments. It examines whether the main purpose of holding a subsidiary is to actively engage in business or if it primarily serves as a passive investment, with a focus on obtaining financial returns. The test considers mixed motives, where both business and investment reasons exist, and prioritises the predominant motive. If the motive test is not met, the participation exemption may still apply based on the 'asset test'. Pursuant to the asset test, a subsidiary is still considered a qualifying participation for the participation exemption as long as the assets of the subsidiary are for less than 50 per cent composed of low-taxed investments. The asset test should be evaluated on a consolidated basis, taking into account all subsidiaries of the relevant participation to the proportion of the share interest in the respective subsidiaries.

The participation exemption can also be applied to membership rights in Dutch cooperatives, irrespective the interest in the Dutch cooperative. The participation exemption encourages legitimate business investments and distinguishes them from passive financial holdings.

ii IP regimes

The Netherlands provides an advantageous tax regime for profits realised with qualifying intellectual property (IP) that the taxpayer developed themselves. This regime is called the innovation box regime. This special regime taxes profits from the research and development (R&D) of qualifying assets at a reduced CIT rate of 9 per cent. The reduced rate applies to R&D profits exceeding a threshold equal to the costs incurred in developing the IP.

Furthermore, the Netherlands offers a credit on wage taxes for the salaries spent on R&D hours of the employees. The credit for wage taxes is 32 per cent over the first €350,000 and 16 per cent over any other R&D costs. The application of this R&D credit is one of the entry tickets into the innovation box regime.

The Dutch innovation box regime is aligned with the OECD BEPS Action 5, aiming to counter harmful tax practices with consideration for transparency and substance. In accordance with Action 5, countries must adjust their IP regimes for accessibility and economic substance. Consequently, the Netherlands has integrated the 'modified nexus' approach into the CITA, wherein only intangible assets developed by the taxpayer qualify for the revised innovation box regime. A nexus formula is employed to determine the portion of R&D income eligible for the innovation box.

iii State aid

The Netherlands also adheres to the European state aid rules, and the European Commission has identified multiple Dutch companies and structures where it took the position that the Netherlands provided state aid. This has led to multiple state aid cases in the Netherlands.

iv General

All relevant items are discussed in the other paragraphs of this Section.

Withholding and taxation of non-local source income streams

i Withholding on outward-bound payments (domestic law)

Dividend payments made by Dutch tax resident companies to residents or non-residents are in principle subject to DWHT against a rate of 15 per cent on profits. Notwithstanding the foregoing, a domestic withholding exemption may apply (see Section VI.ii). For Dutch tax resident recipients, the DWTH may be credited against the recipient's CIT or personal income tax liability. For non-resident recipients, in most case, the DWHT is a final tax. However, the 15 per cent rate may be reduced pursuant to the application of a tax treaty.

Dutch cooperatives, in principle, are exempt from DWHT. However, a Dutch cooperative is subject to DWHT if it qualifies as a 'holding cooperative.' This is the case if, under all

relevant facts and circumstances, more than 70 per cent of the cooperative's activities consist of holding and finance activities. If the Dutch cooperative qualifies as a holding cooperative, only DWHT must be withheld on profit distribution to qualifying members, meaning members entitled to at least 5 per cent of the annual profits of the cooperative and liquidation proceeds. In all other case, the Dutch cooperative does not have the obligation to withhold DWHT on profit distributions.

As of 1 January 2021, the Netherlands has introduced a (conditional) withholding tax on at arm's-length interest and royalty payments made by Dutch tax resident companies (or deemed tax resident companies) to related companies that are resident of (1) a jurisdiction with a statutory profit rate of less than 9 per cent or (2) an EU blacklisted jurisdiction. To determine whether companies are considered related, control (i.e., decisive influence, which, in short, in any case comprises 50 per cent or more of the voting rights, but may also be constituted by overall facts and circumstances) is the relevant criterion. In this respect, it is relevant that all investments held by related parties are taken together and that parties that are 'acting together' (for example in case of coordinated investing) will be taken into account jointly for purposes of this test.

As of 1 January 2024, the conditional withholding tax has been broadened and also applies to dividend payments that meet the aforementioned requirements.

The Dutch list of low-tax jurisdictions and EU blacklisted jurisdictions is released in December of the preceding year. The list for 2024 includes the following low taxed jurisdictions: Anguilla, the Bahamas, Bahrain, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Turkmenistan, Turks and Caicos Islands and Vanuatu. Next to the low taxed jurisdictions, the following jurisdictions are included on the list with EU blacklisted jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, the Bahamas, Belize, the British Virgin Islands, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, the Seychelles, Trinidad and Tobago, Turks and Caicos Islands and Vanuatu.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

The Dutch Dividend Withholding Tax Act 1965 provides for various exemptions from DWHT on dividend distributions, such as an exemption that is available for Dutch tax resident corporate shareholders that can apply the Dutch participation exemption on their interest in the distributing company (in short: at least 5 per cent of the nominal paid-up share capital). The Dutch DWHT exemption has also been made available for non-Dutch corporate shareholders.

The Dutch DWHT exemption may also apply to profit distributions made by Dutch tax resident companies to non-resident corporate shareholders if the shareholder: (1) is a resident in a state with which the Netherlands has concluded a tax treaty containing a dividend article or resident in an EU or EEA member state (and not considered a tax resident of another jurisdiction according to another tax treaty); (2) holds an interest in the distributing company that entitles the shareholder to apply the Dutch participation exemption if it would have been a Dutch tax resident; (3) is considered the beneficial owner of the profits received by the Dutch tax resident company; and (4) does not fulfil a role that is comparable to a Dutch fiscal investment institution or a tax exempt investment institution.

The application of the Dutch DWHT on outbound profit distributions is, however, denied in the event of abuse, which is deemed to be present if: (1) the shares in the Dutch resident company are held with the main purpose, or one of the main purposes, of avoiding Dutch DWHT due by another individual or company (subjective test); and (2) the holding of the shares in the Dutch resident company is part of an artificial arrangement or transaction (or a series of artificial arrangements or composite of transactions), which will be the case if there are no valid business reasons reflecting economic reality (objective test). As of 1 January 2020, the burden of proof for the anti-abuse rule is aligned with the principles described in Section III.i.

iii Double tax treaties

The Netherlands is known for its extensive network of tax treaties to prevent double taxation. Currently, the Netherlands has almost 100 tax treaties concluded with other jurisdictions, providing for, inter alia, beneficial allocation of taxation rights on capital gains and reduced withholding tax rates. Almost all treaties concluded by the Netherlands are based on the Model Convention of the OECD. As a member of the OECD, the Netherlands has officially ratified the Multilateral Convention to Implement Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

As of 1 January 2020, the MLI has resulted in significant possible modifications to most of the Dutch tax treaties, dependent on whether the other contracting state also ratified the MLI and opted for the respective modification. These modifications incorporate various anti-abuse measures in the tax treaties, primarily aimed at preventing base erosion and profit shifting (BEPS).

The Netherlands has actively embraced several key features of the MLI, and among the adopted provisions is the inclusion of mandatory and binding arbitration in instances where the contracting jurisdictions fail to reach a mutual agreement. Notably, the Netherlands has chosen the principal purposes test as the primary anti-treaty abuse rule, aligned with international efforts to combat harmful tax practices and ensure the integrity of tax treaties.

iv Taxation on receipt

Any income, including dividends, interest and royalties received by resident companies are generally included in a taxpaying company's tax base, with an exemption of dividend income and capital gains derived from qualifying participations under the Dutch participation exemption; see Section V.i.

Furthermore, due to the extensive tax treaty network, Dutch tax resident companies can typically mitigate the risk of double taxation on income sourced from abroad. Relief can be sought for incoming dividends, interest and royalties by invoking provisions within existing tax treaties. Where no tax treaty is available, relief from double taxation is typically provided under the Dutch unilateral rules designed for the avoidance of double taxation.

Taxation of funding structures

i Thin capitalisation

This is not applicable in the Netherlands.

ii Deduction of finance costs

Interest costs on are in principle deductible for Dutch CIT purposes, unless the debt qualifies as equity for Dutch tax purposes or if an interest deduction limitation applies. The requalification of loans and interest deduction limitations are further described below.

Requalification of loans

The qualification of financing instruments as debt for Dutch tax purposes follows in principle the qualification of these financing instruments for Dutch civil law purposes. In this regard, a repayment obligation is essential for the qualification as debt for Dutch civil law purposes. However, three exceptions have been defined in Dutch case law pursuant to which debt is requalified as equity for Dutch tax purposes, which are: (1) a sham loan; (2) a loss financing loan; and (3) a hybrid financing or participating loan.

A sham loan

A loan is qualified as a sham loan when it is apparent that both parties never intended to provide a loan, but actually intended to contribute equity.

A loss financing loan

With a loss financing loan, it is apparent from the first moment that the loan will never be repaid and that all parties knew this.

A hybrid financing or participating loan

A participating loan is considered loan where, based on the terms of the loan, the lender in fact is participating in the borrower's capital. In this case, the debt is requalified as equity if: (1) the duration of the loan is perpetual (i.e., the duration is more than 50 years) or if the loan is solely repayable in the event of bankruptcy or liquidation; (2) the interest due on the loan is (almost) completely dependent on the profits realised by the borrower; and (3) the loan is subordinate to all other creditors.

If none of the aforementioned exceptions are applicable, the at arm's length interest expense should be deductible for Dutch CIT purposes, subject to any relevant interest deduction limitation rules. For the at arm's length interest rate, the Dutch Supreme Court has introduced the concept of 'non-businesslike loans'. A loan between related parties is categorised as non-businesslike if the terms and conditions are not in line with what independent (unrelated) parties would typically agree upon in similar circumstances.

Where determining a businesslike interest is not feasible, as it would essentially transform the loan into a profit-sharing arrangement or deviate from the original intentions of the parties, the loan is deemed to carry a non-businesslike risk of default. These loans generally lack a formal agreement, a repayment schedule or any security, making write-down losses on these loans non-deductible. According to the 'guarantor analogy'

method devised by the Dutch Supreme Court, the interest rate can be ascertained by considering the rate that a third party, such as a bank, would charge if the parent company or the lender, if not the parent company, presented itself as a guarantor.

Another crucial factor in determining the deductibility of interest expense for Dutch CIT purposes is the presence of specific interest deduction limitation rules. These are further described below.

Anti-base erosion

Dutch tax legislation includes a provision aimed at preventing scenarios characterised as 'base erosion'. These structures typically involve the conversion of (group) equity into debt through transactions with an artificial nature (i.e., lacking valid business reasons). Interest on and fluctuations in the value of loans legally or de facto owed to related companies are non-deductible when these loans are linked, directly or indirectly, to specific 'tainted' transactions. These 'tainted' transactions include:

1. profit distributions or capital repayments by the taxpayer (or a related company or individual) to a related company;
2. capital contributions by the taxpayer (or a related company or individual) in a related company; and
3. acquisitions or increases by the taxpayer (or a related company or individual) in a company that becomes a related company due to the acquisition or increase.

However, this anti-abuse provision does not apply if the taxpayer can prove that the loan and 'tainted' transaction are primarily motivated by valid business reasons or if the interest is subject to tax at a rate of at least 10 per cent at the recipient's level. These exceptions are valid unless the tax inspector can establish that the debt and tainted transactions are not predominantly motivated by valid business motives.

Earnings stripping rule

The Netherlands has implemented an earnings stripping rule, pursuant to the EU Anti-Tax Avoidance Directive (ATAD). This rule determines that the deduction of net interest expenses is limited to the highest of either 20 per cent of the earnings before interest, taxes, depreciation and amortisation (EBITDA) or €1 million.

The net interest expenses are defined as the balance of a taxpayer's interest expenses, including certain related costs and foreign exchange losses on the one hand, and a taxpayer's interest income, including foreign exchange gains, on the other. EBITDA is calculated based on tax accounts and excludes tax exempt income. Because the earnings stripping rule applies per taxpayer, a CIT fiscal unity cannot apply for a larger threshold. Any net interest expenses that are not deductible in a year can be carried forward indefinitely.

iii Restrictions on payments

In accordance with the Dutch Civil Code, a Dutch company with limited liability can distribute funds to its shareholders and other entitled parties only when its net assets

surpass the total of its issued and paid-up capital, along with reserves mandated by law or specified in the company's articles of association. Additionally, BVs are subject to a distribution assessment, ensuring that profits are allocated to shareholders and other beneficiaries only if it does not compromise the company's capacity to fulfil its immediate financial obligations.

iv Return of capital

A repayment of capital has no adverse tax consequences from a Dutch CIT perspective. However, a repayment of capital recognised as paid-up capital for Dutch DWHT purposes will trigger Dutch DWHT on profits. This is, however, not the case if the general meeting of shareholders has resolved in advance to make the repayment and the articles of association of the company have been amended to reduce the nominal value of the ordinary shares by an equal amount. The capital recognised as paid-up capital for Dutch DWHT purposes may consist of formal capital, informal capital and share premium. To execute these formal actions, the involvement of a Dutch civil notary is necessary.

Acquisition structures, restructuring and exit charges

i Acquisition

Share deal

A share deal, in which the shares in a Dutch company are acquired, may be conducted directly by a foreign company or indirectly through a Dutch acquisition company. In this context, it is possible to utilise Dutch cooperatives as shareholders for Dutch acquisition companies, primarily because Dutch cooperatives are generally not subject to DWHT, provided they adhere to the anti-abuse rules; see section VI.i.

The purchase price paid for the acquisition of shares should be activated on the balance sheet of the acquiring company for Dutch tax purposes. Subsequently, it is not permissible to depreciate the purchase price paid for CIT purposes.

If shares in a Dutch tax resident company are acquired by a Dutch acquisition company, or if a foreign company uses a Dutch tax resident acquisition vehicle, it is possible to include the acquisition company and the targets in a CIT fiscal unity if the conditions are met (see Section III.i). This ensures that the acquiring company is able to offset the interest expenses against taxable profits of the other Dutch tax resident group companies, which is typically difficult without forming a CIT fiscal unity due to the lack of taxable profits at the level of the acquiring company. However, the limitations on interest deduction for acquisition debt as described in Section VII.i should be considered and may limited the interest deduction.

If the acquisition of a Dutch target is performed directly through the foreign company, the foreign shareholder may be subject to Dutch CIT under the non-resident taxation rules if

the anti-abuse rules have not been met. This should not be the case if there is no individual holding at least 5 per cent of the shares in the Dutch company indirectly.

Asset deal

An asset deal can be carried out either directly by a foreign company or through incorporating a Dutch company that acquires the Dutch business or assets. Generally, capital gains realised by a Dutch tax resident company selling the assets are subject to Dutch CIT. Nevertheless, under specific conditions, it is feasible to defer the CIT obligation by utilising a 'reinvestment reserve'. This reserve facilitates a rollover mechanism, allowing for the postponement of Dutch CIT payment related to the realised gains, provided certain requirements are met.

ii Reorganisation

The Dutch Civil Code provides several options for mergers and demergers, including a stock merger, business enterprise merger, legal merger or demerger and legal split-off. The CITA offers multiple facilities, subject to various requirements, allowing for the rollover of book values concerning the transferred assets and shares.

iii Exit

Dutch tax residents relocating their businesses outside the Netherlands are generally liable to Dutch CIT for both realised and unrealised profits (i.e., hidden reserves and goodwill). On the other hand, companies relocating to the Netherlands are provided a step-up for all assets and liabilities.

For relocations outside the Netherlands, the CIT payment may be deferred, under specific conditions, if the taxpayer's new residence falls within the EU or EEA.

Anti-avoidance and other relevant legislation

i General anti-avoidance

In essence, Dutch tax law permits taxpayers to organise their financial matters in a way that minimises their tax liability. However, they are prohibited from initiating actions primarily aimed at reducing their tax burden. While there are no explicit statutory anti-abuse provisions in the CITA, various doctrines exist in Dutch case law, often used interchangeably. It is crucial to note that these doctrines are not universal solutions and can only be applied by the Dutch tax inspector as a last resort.

The doctrine of 'independent determination (or reclassification) of the facts for tax purposes' outlines the process by which the court assigns a specific fact or set of facts from Dutch tax perspective. The court may surpass formal documentation, examining the 'substance' of a transaction, such as the proper classification of debt versus equity, sale versus lease, and compensation versus disguised dividend.

The non-statutory concept of *fraus legis* (abuse of law) provides tax authorities with the authority to challenge the validity of a transaction if the primary motive is tax avoidance (subjective element) and the transaction violates its purpose and intent (objective element). In these cases, the transaction is deemed abusive and is treated differently from its legal form.

ii Controlled foreign corporations

As of 1 January 2019, the Dutch government has implemented a simplified version of the ATAD Model A Controlled Foreign Company (CFC) regime, specifically tailored for CFCs established in jurisdictions with a statutory profit tax rate below 9 per cent or EU blacklisted jurisdictions. For an overview of these jurisdictions, reference is made to Section VI.i. With the Dutch arm's-length principle, the Dutch government took the position the ATAD Model B CFC regime was already present in the Dutch tax legislation.

Control is determined by a direct or indirect interest exceeding 50 per cent in nominal capital, voting rights or entitlement to profits, either individually or collectively with related parties. Companies primarily earning non-tainted income or qualifying as certain financial institutions mainly receiving income from third parties are not classified as CFCs. Tainted income (including interest, royalties, dividends, and leasing income) of a CFC not distributed by year-end is proportionally attributed to the Dutch controlling company. However, tainted income of a CFC is not attributed if the company engages in genuine economic activities. A CFC meets the genuine economic activity threshold by satisfying Dutch minimum substance requirements and the own office criteria (for a minimum of 24 months) along with a €100,000 annual salary requirement.

iii Transfer pricing

The Netherlands has included the arm's-length principle into the Dutch CIT. The arm's-length principle corrects transactions between affiliated parties when these parties have not agreed under the same conditions as third parties would have agreed. If the Dutch tax authority takes the position that transactions are not at arm's length, it can adjust the applied prices by imposing additional CIT assessments.

As of 1 January 2022, the Netherlands denies downward adjustments based on the arm's-length principle if the taxpayer is unable to show that a corresponding upward adjustment is made.

Further, the Netherlands has implemented a Transfer Pricing Decree, which largely implements the OECD Transfer Pricing Guidelines into national legislation. Transfer pricing regulations aim to allocate the profits within a group of companies according to the risks those companies are taking. There are different methods of profit allocation permissible, dependent on the facts and circumstances of the situation.

For fiscal years starting on or after 1 January 2016, multinational enterprise (MNE) groups with the ultimate parent company tax-resident in the Netherlands must adhere to country-by-country (CbC) reporting requirements, aligned with the Final Report on Action 13 of the OECD/G20 BEPS Project. The parent company must submit an annual CbC report for the global group to the tax authorities, no later than 12 months after the fiscal period's end, if the group's consolidated turnover was €750 million or more in the preceding

fiscal year. In instances where the parent company is resident in a country without CbC reporting requirements, lacks an effective exchange mechanism with the Netherlands or systematically neglects its exchange of information obligations, another group member resident in the Netherlands may be required to file a Netherlands CbC report.

The CbC report should encompass information for each territory where the MNE group operates, including revenue, profit before income tax, income tax paid and accrued, number of employees, stated capital, total retained earnings and total tangible assets excluding cash or cash equivalents. Each company in the group conducting business in a specific tax jurisdiction must be identified along with the associated business activities.

Furthermore, Dutch tax resident companies who are a member of an MNE group with a consolidated turnover of €50 million or more must prepare a master file (providing an overview of the MNE group's business) and a local file (containing information relevant for the transfer pricing analysis in intercompany transactions involving the Dutch taxpayer) for inclusion in their records prior to filing the corporate tax return.

Not meeting these tightened documentation requirements may lead to fines.

iv Tax clearances and rulings

The Netherlands is renowned for the cooperative and constructive approach of its tax authorities, offering the opportunity to proactively discuss the tax treatment of specific situations through ATRs and APAs for upfront certainty. An ATR provides assurance to the taxpayer regarding the tax treatment of international structures, such as the applicability of the Dutch participation exemption, while an APA ensures upfront certainty regarding transfer pricing for intra-group transactions.

These 'settlement agreements' are negotiated by the Dutch ruling team in close collaboration with the Central Point for Potential Foreign Investors, providing foreign investors with advanced clarity on the tax treatment of their potential investments in the Netherlands. The APA and ATR gives the Dutch taxpayer certainty in advance on the Dutch tax aspects of certain transactions or structures for a maximum of five financial years.

In recent years, the Netherlands has updated its ruling practice. To obtain a ruling, there must be sufficient substance in the Netherlands at the group level, known as the 'economic nexus requirement', and the requesting company must have adequate substance for the items covered by the ruling. Rulings are in principle not granted if (1) the sole or primary purposes of the transaction is to save Dutch or foreign taxes or (2) the direct transaction relates to a company or permanent establishment located in a low-taxed or EU blacklisted jurisdiction (see Section VI.i).

Recently, the ruling practice has been amended in such a manner that taxpayers can also obtain certainty in advance if they want to dismantle a structure. In the event that a taxpayer dismantles an existing structure that has an element of avoiding Dutch or foreign taxes and includes flow of funds to related companies in low-taxed jurisdictions and non-cooperative jurisdictions, the Dutch tax authority is willing to provide certainty in advance.

Year in review

The 2024 Dutch tax plan, proposed on Budget Day 2023, provided some changes to existing Dutch law. However, some will enter into force as of 1 January 2025, see Section XI.

As of 1 January 2024, a progressive tax rate was introduced in Box 2 of the Dutch Personal Income Tax Act 2001 (PITA). In short, Box 2 of the Dutch PITA taxes income (capital gains and dividends) derived from a substantial shareholding (at least 5 per cent of the total issued capital of a company). Previously, Box 2 income was subject to a flat rate of 26.9 per cent. However, as of 1 January 2024, income up to €67,000 is subject to 24.5 per cent, and income in excess of this threshold is subject to 33 per cent.

Other notable changes included the 2024 Dutch tax plan are in the 30 per cent scheme (see Section III.ii), the transitional law relevant for the qualification of limited partnerships (see Section II.ii).

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Outlook and conclusions

Currently, a Dutch fund for joint account (FGR) can be qualified transparent or non-transparent for Dutch tax purposes, based on the specific conditions of the FGR (e.g., the consent requirement). From 1 January 2025, an FGR will only be non-transparent, provided that it is regulated following the Dutch financial supervision legislation and the participations in the FGR are tradable. If the participations in an FGR can only be repurchased by the FGR, rendering them non-tradable, the FGR will be considered tax-transparent even if it is regulated. In all other circumstances, including those involving typical family-owned FGRs, they are currently classified as non-transparent.

Furthermore, Dutch investment institutions will no longer be allowed to directly invest in real estate, effectively abolishing the Dutch equivalent of the REIT regime. A temporary RETT exemption applies as of 1 January 2024, and until the moment that the new legislation enters into force (1 January 2025), to create the possibility of restructuring current Dutch investment institution structures in a tax-efficient manner.

Finally, the classification rules of foreign companies and partnerships will change as of 1 January 2025. The Netherlands currently employs the 'similarity approach' to categorise foreign companies. In essence, this method involves examining the most comparable Dutch equivalent of the foreign company (i.e., 'corporate resemblance') to determine its

Dutch tax qualification. Based on the new legislation, the similarity approach remains the primary classification rule. However, due to the revised rules for the Dutch CVs, which would automatically be treated as transparent for Dutch tax purposes, numerous hybrid mismatches are expected to be eliminated. This aligns the Netherlands with the approach taken by most other jurisdictions, considering a foreign partnership as transparent for tax purposes. In cases where the similarity approach proves inadequate, two new rules will be introduced. For foreign companies lacking a clear Dutch equivalent, the 'symmetry approach' will be implemented. This entails the Netherlands adopting the classification of the foreign company's jurisdiction of establishment. Foreign companies without a distinct Dutch equivalent, based in the Netherlands, will consistently be treated as non-transparent companies, thus becoming Dutch domestic taxpayers.

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Endnotes

1. Gabriël van Gelder and Marc Oostenbroek are partners and Mark Fennis is a tax manager at VanLoman. ^ Back to section

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