Tax on Inbound Investment

Contributing editors
Peter Maher and Lew Steinberg

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Tax on Inbound Investment 2019

Contributing editors

Peter Maher and Lew Steinberg

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2007
Thirteenth edition
ISBN 978-1-78915-075-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Tax on Inbound Investment 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Tax on Inbound Investment*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador and Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Peter Maher of A&L Goodbody and Lew Steinberg of Merrill Lynch, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
September 2018

Netherlands

Friggo Kraaijeveld and Ceriel Coppus

Kraaijeveld Coppus Legal

Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

Upon the acquisition of stock, and where the acquisition company is a Dutch entity, the participation exemption may apply. Under the participation exemption, income (including dividends and capital gains) from a qualifying participation is exempt from Dutch corporate income tax. On the other hand, losses on a qualifying participation are in principle non-deductible. Acquisition and sales costs, earn-out payments, payments under (balance sheet) guarantees and indemnities are generally not taxable or tax-deductible under the participation exemption (see question 15 for the participation exemption conditions).

In the case of an acquisition of the legal and economic ownership of at least 95 per cent of the nominal and paid-up stock by the acquisition company, a fiscal unity (tax grouping) may be formed between the acquisition and acquired companies. Companies forming a fiscal unity can set off losses (eg, from interest costs on acquisition financing) and profits (eg, of the acquired company), albeit under certain conditions (see question 8).

Acquisition of stock in a real estate entity may be subject to 6 per cent Dutch real estate transfer tax (RETT). The purchase of stock in a Dutch company is generally not subject to Dutch VAT (see question 6). In the case of a purchase of stock, the book value of the assets reported by the company acquired remains unchanged.

In the case of a purchase of business assets and liabilities (asset transaction), the acquisition company should report the acquired assets at fair market value. The purchase of Dutch real estate is, in principle, subject to 6 per cent RETT. The asset transaction is, in principle, a taxable event for VAT purposes, but may be non-taxable in case of a purchase of 'totality of goods'. For additional taxes, see question 6.

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

Only in the event of an asset transaction does a step-up to fair market value apply to the acquired assets and liabilities. The depreciation of those assets (including acquired goodwill and other intangible assets) is tax deductible. However, the annual amount of tax-deductible depreciation is limited to 10 per cent of the cost price for acquired goodwill and 20 per cent of the cost price for other intangible assets.

For tax purposes, acquired stock in a company is booked at historical cost price. If the participation exemption applies, no tax-deductible depreciation of stock is possible. The book value of the assets reported by the company acquired remains unchanged.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

It is preferable to use a Dutch acquisition company to execute an acquisition for several reasons.

The main advantage of using a Dutch acquisition company for the acquisition of stock in a Dutch target company is the possibility to form a fiscal unity between the Dutch acquisition company and the company acquired. To form a fiscal unity, the Dutch acquisition company would (among other conditions) need to acquire the legal and economic ownership of at least 95 per cent of the nominal and paid-up shares in the company acquired. Subject to certain anti-abuse legislation, forming a fiscal unity would, for instance, allow the Dutch acquisition company to set off losses against the profits realised within the fiscal unity.

For acquisitions of stock in a non-Dutch company, it may be beneficial to use a Dutch acquisition company for the following reasons:

- tax-efficient repatriation of funds (eg, reduced withholding tax rates) by means of the numerous tax treaties concluded by the Netherlands for the avoidance of double taxation, in combination with the participation exemption;
- asset protection through one of the many bilateral investment treaties concluded by the Netherlands; and
- highly skilled professional advisers and support (banks, lawyers) and an efficient court resolution by a separate court for entrepreneurial disputes.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Legal mergers and share-for-share mergers (hereafter jointly referred to as 'mergers') are not that common as they are not the most straightforward method of acquisition. A possible advantage of a merger lies in the fact that, although subject to the terms of the transaction, it could be possible to minimise the need to attract funding by the acquisition company and limit the spending of cash.

Additionally, when contemplating an asset transaction by way of a business or legal merger, mergers are considered as beneficial, as these provide the opportunity to continue reporting the 'acquired' assets and liabilities at historical cost price (instead of reporting at fair market value) and thus postpone taxation of unrealised profits for the 'seller'.

The main disadvantage of such tax-neutral business or legal mergers is the possible inflexibility of on-selling the merged company within the respective clawback period (generally three years) imposed by anti-abuse measures. If applicable, the clawback rules stipulate that the postponed taxation of unrealised profit reserves is reversed, resulting in the taxation of the unrealised profit reserves with retroactive effect.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

It may be beneficial for the buyer to issue stock in the event that cash funding cannot be obtained by the acquisition company, or in case interest costs on acquisition financing cannot be deducted (under anti-abuse legislation). See question 8 for more information on interest deduction limitations.

With reference to question 4, it is possible to postpone taxation when issuing stock as consideration for the acquisition.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

In the case of an acquisition of existing or newly issued stock, no stamp duty (or other documentary taxes) is due.

However, there is a possibility that, upon an acquisition of stock, 6 per cent RETT is due if the target company qualifies as a 'real estate entity'. This is the case if all of the following requirements are met:

- the stock is acquired in an entity with an equity divided into shares, or an entity incorporated under the laws of another state that has the same characteristics of an entity with an equity divided into shares;
- the stock is acquired in an entity of which, at the time of the acquisition or at any time in the preceding year, the assets consist or consisted of 50 per cent or more of real estate, and at least 30 per cent of all assets consist of Dutch real estate;
- the activities pertaining to the real estate consist, at the time of the acquisition or at any time in the preceding year, of 70 per cent or more of the acquisition, disposal or exploitation of that real estate; and
- the buyer directly or indirectly acquires an interest of at least one-third in the entity, including any interest the buyer may already directly or indirectly hold.

For VAT purposes, the acquisition of stock should not be considered a taxable event.

In the case of an asset transaction, no stamp duty (or other documentary taxes) should be due. Upon the acquisition of Dutch real estate, 6 per cent RETT is normally due. However, the acquisition of Dutch real estate may be exempt from RETT if the transaction relates to certain types of mergers, split-offs or internal reorganisations.

The acquisition of assets is normally subject to 21 per cent VAT. The transfer of real estate is generally exempt from VAT, unless the transfer concerns newly developed real estate (ie, construction sites and (part of) buildings including the surrounding terrain, prior to, on or within a period of two years after the moment of first use of the buildings concerned). Should a transfer of real estate indeed be subject to VAT, an exemption generally applies for RETT.

Finally, in the case of an asset transaction where a 'totality of goods' is acquired, the acquisition may be considered as a non-taxable transfer for VAT purposes.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

In the case of an asset transaction, the losses remain with the seller and may be set off by the seller against the capital gains realised with the sale.

In the case of an acquisition of stock in a company (regardless of its status) with a tax-loss carry-forward, the company acquired may still utilise the losses post-acquisition, subject to specific restrictions in case the acquisition of that company results in a 'change of control'. In this respect, a change of control is generally considered to be the case if the transferring shareholder directly or indirectly alienates an interest of 30 per cent or more in the transferred company.

Subject to certain exceptions, losses generally remain available after a change of control, provided that all of the following requirements are met:

- the losses did not occur in a year wherein the assets of the acquired company consisted mostly (50 per cent or more) of passive portfolio investments for a period of at least nine months;
- just prior to the acquisition, the activities of the target company have not been reduced to less than 30 per cent when compared to the activities of the company when it incurred the oldest losses available for compensation; and
- at the time of the acquisition, it is not intended to reduce the activities of the target company to less than 30 per cent (as described in the above point) within three years of the acquisition.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Interest expenses are, in principle, tax deductible. However, various anti-abuse measures may deny the deduction of interest expenses on loans due to related entities. Generally speaking, the acquisition company and a lender are considered related entities if:

- the lender directly or indirectly holds an interest of at least one-third in the acquisition company;
- the acquisition company directly or indirectly holds an interest of at least one-third in the lender; or
- an entity directly or indirectly holds an interest of at least one-third in both the acquisition company and the lender.

Firstly, it is noted that interest costs on loans to related entities exceeding an arm's-length rate are in principle requalified (for the part that is not at arm's length) into non-deductible deemed dividends or informal capital contributions. In addition, loans between related parties may be provided under such conditions that, for Dutch tax purposes, these loans are requalified into equity. Consequently, interest payments on such requalified loans are treated as deemed dividends or informal capital contributions.

Below is a short elaboration of the most important interest deduction limitations for debt acquisition financing.

Anti-abuse legislation for specific types of transactions

According to specific anti-abuse legislation, the deduction of interest (including foreign exchange results) may be denied if a Dutch-resident company finances one of the following transactions with a loan obtained from a related party:

- profit distribution or capital repayment to a related party;
- capital contribution in a related party; or
- the acquisition of an interest in a company, which after the acquisition, constitutes a related party.

The deduction of interest expenses will nevertheless be allowed if the company paying the interest can substantiate that:

- the loan, as well as the related transaction, are both mainly based on sound business reasons;
- the interest received by the lender is taxed at a rate that is considered to be reasonable for Dutch tax purposes (10 per cent or more); or
- the loan is ultimately provided by unrelated parties.

The Dutch tax authorities may nevertheless deny the deduction of interest expenses if they successfully demonstrate that the loan has been entered into in anticipation of loss compensation by the lender.

Anti-abuse legislation applicable to related and non-related loans

Anti-abuse legislation is applicable to related and non-related loans by way of limitation of excessive interest deduction rules and specific fiscal unity rules.

Limitation of excessive interest deduction

The amount of non-deductible 'excessive interest' is the proportionate total amount of interest expenses (including related costs) set off against the average total amount of debt deemed used to finance the target company and the average total amount of debt outstanding.

Subject to certain exceptions, debt is deemed to be used to finance the acquisition of a target company if the amount of the combined historic cost price of all the taxpayers' participations exceeds the taxpayer's equity.

A threshold of €750,000 (per annum) applies based on which the deduction of excessive interest expenses up to this amount will not be limited.

Fiscal unity

Pursuant to other anti-abuse legislation, the deduction of interest expenses may be limited where the acquiring company has obtained a loan (whether from a related party or not) used for the purchase of the acquired company (acquisition loan), and mentioned companies form a fiscal unity directly after the acquisition.

The above-described limitation of interest deductibility only applies to the extent that the annual interest on the acquisition loan amounts to more than €1 million, and only to the extent the interest expenses relate to 'excessive' acquisition loans. Subject to certain provisions, the initial acquisition loan is considered excessive if the nominal value of the obtained acquisition loan is more than 60 per cent of the acquisition price of the acquired company.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

It is not uncommon that the acquisition company and seller agree on a full indemnity by the buyer for tax costs (increased with interest and penalties) relating to the pre-acquisition (pre-effective date) period and that are not provided for in the acquisition balance sheet of the acquired company for the statutory limitations period. Often the maximum indemnity is limited to the value of the acquisition price.

The tax indemnities are often described in a separate tax schedule to the share-purchase agreement. If the acquired company formed part of a fiscal unity, specific warranties and indemnities are agreed with regard to liabilities relating to the period of such fiscal unity period.

In the case of a purchase of stock, and assuming the participation exemption applies, payments under an indemnification or warranty should generally be tax-neutral for both the acquisition company and the seller, as the payments would normally be considered a non-taxable correction of the initial purchase price or a reimbursement for (future) expenses or liabilities or both.

In case of an asset transaction, only limited tax warranties are provided by the seller as the tax liabilities generally do not pass to the acquisition company.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

The most typical post-acquisition restructuring is the formation of a fiscal unity between the acquisition company and the target company. See question 3 for more details on fiscal unity.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

For Dutch corporate income tax purposes, a spin-off can be executed tax-neutrally if the splitting company and the receiving company meet certain requirements. One of these requirements is that neither the splitting company nor the receiving company may have any net operational losses. In case not all the requirements are met, unrealised profit reserves of the transferred assets are fully taxed unless the spin-off is performed in line with the conditions laid down in a ministerial decree. For transfer taxes, see question 6.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

In principle, the migration of a company that is resident in the Netherlands for Dutch tax purposes leads to taxation of all unrealised gains and losses, as all assets and liabilities are deemed sold just prior to migration. The migrating company, however, may opt for a deferral of payment of the taxation, subject to certain conditions.

Two different options exist for a deferral of payment upon migration. The first option provides for a deferral of payment of the tax due until the moment the gains and losses have been effectively realised, taking into account the following:

- the deferral only applies insofar as the company migrates to and remains resident of an EU member state or a jurisdiction within the EEA;
- the deferral only includes taxation of unrealised gains and losses, which is annually assessed by information provided by the migrating company (ie, the annual filing of the fiscal balance sheet, profit and loss account and additional information based on which the Dutch tax authorities can determine whether the gains and losses of the underlying assets have effectively been realised);
- the deferred payable amount will be increased with (levy) interest calculated over the amount of tax due as per the migration date; and
- the migrating company has to provide sufficient assurance to the Dutch tax authorities (in most cases a bank guarantee) for the postponed tax liability.

The second option provides for the opportunity to pay the tax due upon migration (to jurisdiction within the EU or EEA) in 10 equal annual instalments. These 10 instalments are payable, regardless of whether the gains and losses of the underlying assets have been effectively realised. Although (levy) interest will be calculated and sufficient assurance must be also provided to the Dutch tax authorities, no further administrative requirements are imposed to the taxpayer opting for payment in 10 instalments.

A migration of a pure Dutch holding company only owning shares in (foreign) subsidiaries would normally not lead to a Dutch corporate income tax liability, as any gains (or losses) on those shares should be exempt under the application of the participation exemption. (See question 15 for more information on the application of the participation exemption.)

Should the migrating company continue to (partially) remain a Dutch resident for Dutch corporate income tax purposes – for instance, as a result of a Dutch permanent establishment – the unrealised gains and losses of the assets attributable to the Dutch permanent establishment would not be taxed as a result of the migration.

In addition to the above, should the migration of the company not only result in the migration of the effective place of management but also realise the migration of the corporate seat, the migration may also trigger Dutch dividend withholding tax. The migration of the corporate seat can (effectively) be realised by a cross-border conversion and a cross-border merger.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Dividend distributions

Dividends distributed by a Dutch BV (private limited company) or NV (public limited liability company) to a foreign shareholder are generally subject to 15 per cent Dutch dividend withholding tax. However (except for specific abusive situations), an exemption of dividend withholding tax applies if:

- the shareholder is considered tax resident in a member state of the EU, a state of the EEA or a third country that has entered into a

Update and trends

Multilateral instrument
Background
The Netherlands signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) on 7 June 2017. The MLI is one of the key outcomes of the OECD Base Erosion and Profit Shifting Project and aims to prevent international tax avoidance. The MLI will only affect tax treaties if both tax treaty partners are signatories to the MLI and both parties have designated a tax treaty as a 'covered tax treaty' or CTA.

82 Covered tax agreements
The Netherlands has designated tax treaties with the following jurisdictions as a CTA: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Yugoslavia -Bosnia and Herzegovina, Canada, China, Croatia, Czechoslovakia-Czech Republic, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia (FYROM), Malawi, Malaysia, Malta, Mexico, Moldova, Yugoslavia-Montenegro, Morocco, New Zealand, Nigeria, Norway, Oman, Pakistan, Panama, Philippines, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Yugoslavia–Serbia, Singapore, Czechoslovakia-Slovak Republic, Slovenia, South Africa, Sri Lanka, Suriname, Sweden, USSR-Tajikistan, Thailand, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States of America, Uzbekistan, Venezuela, Vietnam, Zambia, Zimbabwe.

Most important changes
The most important changes following the MLI are considered to be the introduction of the Principal Purpose Test (PPT) and the revision of the preamble that states that the relevant tax treaty is not intended to provide double taxation, nor opportunities for non-taxation or reduced taxation.

Principal Purpose Test
The PPT provision essentially denies a treaty benefit if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the CTA.

Mandatory Disclosure Directive
On 25 May 2018, the Mandatory Disclosure Directive (the Directive) was formally adopted by the Council of the European Union. The Directive introduces mandatory disclosure rules for intermediaries, regarding any kind of tax except for VAT, custom duties, excise duties and compulsory social contributions.

Intermediaries (such as lawyers, accountants, tax advisers and financial advisers) with residency, incorporation, professional registration or a permanent establishment in an EU member state fall within the scope of the Directive. These intermediaries are required to report any cross-border arrangement concerning at least one EU member state, which consists of potentially aggressive tax planning that fall within a set of 'hallmarks' set out in the Directive. Such arrangements should be reported within 30 days of having been made available to the client. The Directive also provides the means for tax administrations to exchange information on these arrangements to other member states by means of automatic information exchange protocols. In cases where there is no intermediary involved in the arrangement, the obligation to report lies with the client or its in-house tax department. Non-compliance with the Directive by intermediaries or clients will lead to penalties.

EU member states should implement the Directive in their domestic legislation ultimately on 31 December 2019. The Directive will become applicable on 1 July 2020 and will have retroactive effect for all arrangements of which the first step of implementation takes place in the time frame between the entry into force and the application of the Directive. As of 31 October 2020, the first information will be exchanged between EU member states and thereafter they are obliged to exchange information every three months.

tax treaty with the Netherlands that contains qualifying provisions relating to dividend; and
- the shareholder owns an interest to which the Dutch participation exemption would be applicable if the foreign shareholder were a resident of the Netherlands.

If the Dutch dividend withholding tax exemption applies, the Dutch Tax Authorities have to be notified within a month of the distribution of the dividend. The Dutch dividend withholding tax exemption also applies to distributions made to a hybrid entity, provided certain conditions are met.

Important to note is that a holding cooperative (ie, the activities of the cooperative consist for at least 70 per cent of holding participations or direct or indirect intra-group financing activities) with qualifying membership rights (ie, the holder of the membership rights is eligible to at least 5 per cent of the annual profits or the proceedings from the possible liquidation of the holding cooperative) is treated similar to a Dutch BV or NV. Therefore, a holding cooperative falls within the scope of the dividend withholding tax and the dividend withholding tax exemption as discussed above. However, a regular cooperative is always exempt from dividend withholding tax .

Furthermore, if the shareholding is attributable to a Dutch permanent establishment, dividend distributions would not be subject to dividend withholding tax insofar as the derived income from the shareholding is exempt from Dutch corporate income tax under the application of the participation exemption.

Most tax treaties allow for a reduced dividend withholding tax rate of 5 per cent, or in some occasions zero per cent if the required conditions are met.

Interest payments
Interest payments are, in principle, not subject to (withholding) tax unless, and in as far as, the interest costs on related-entity loans exceed an arm's-length rate or in case the loan is requalified into equity for Dutch tax purposes. Interest distributions that have been reclassified as dividends are taxed as regular dividend distributions.

Substantial interest taxation
Income (including dividend, capital gains and interest payments) derived by a non-resident may also be subject to Dutch corporate income tax in the case where the income is derived from a 'substantial interest' in a Dutch company. As a general rule, a foreign company is considered to have a substantial interest if such entity is entitled to at least 5 per cent of the value or voting rights in a Dutch company. Income derived from a substantial interest is subject to Dutch corporate income tax if:
- the substantial interest is held with the main purpose (or one of the main purposes) being to avoid Dutch individual tax of another person; and
- the structure can be considered artificial or put in place through a series of artificial arrangements.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

The Netherlands has an elaborate tax treaty network, providing respective residents with heavily reduced withholding tax rates. In addition, Dutch companies can benefit from EU directives (such as the EU Parent-Subsidiary Directive). The most common method to reduce (or often even avoid) withholding taxes on the repatriation of profits is to organise the corporate structure in such a way that these tax treaty benefits (or European directives) are made use of in an optimal manner.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

The sale of stock in either a local or foreign company would normally be the most beneficial disposal for a Dutch corporate seller, as capital gains are exempt from Dutch corporate taxation if the participation exemption applies. The participation exemption applies if the following requirements are met:

- the Dutch parent company holds at least 5 per cent of the nominal issued and paid-up capital of a (local or foreign) company of which the capital is partially or wholly divided into shares; and
- the subsidiary company is not considered to be held as 'portfolio investment' (the 'motive test').

Generally, a participation is held as portfolio investment if it is held with the intention to realise a yield that might be expected in case of regular asset management.

In cases where the motive test is not met, the participation exemption nevertheless applies when the 'tax rate test' or the 'asset test' (or both) is met. These tests are satisfied when:

- the participation is subject to a (foreign) tax rate of at least 10 per cent with a tax base roughly similar to the Dutch tax base (tax rate test); and
- the fair market value assets of the direct and indirect subsidiary consist of less than 50 per cent of 'low-taxed free portfolio investments' (asset test).

In essence, low-taxed portfolio investments are those assets that do not have a function in the business enterprise of the entity holding the asset, and the income related to the assets is not subject to a tax rate of at least 10 per cent.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

The gain derived by a disposal of stock in a Dutch company by a non-resident company should, in principle, not lead to Dutch taxation. If the stock qualifies as a substantial interest, however, the capital gains may be taxed with Dutch corporate income tax. For more information on substantial interest taxation, see question 13.

Under most tax treaties concluded by the Netherlands, the levy of capital gains is allocated to the country of residence of the shareholder and is exempt from taxation in the source state (ie, the Netherlands). Thus, if the non-resident company may apply for the application of such tax treaty, the disposal of stock should not be subject to Dutch taxation, regardless of whether or not the income is derived from a substantial interest.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

A disposal of shares is generally exempt under the application of the participation exemption. See question 15 for more information on the participation exemption.

A disposal of business assets is, in principle, taxable with Dutch corporate income tax unless the tax payer appeals to a special tax incentive, such as the tax-neutral mergers described in question 4. Additionally, a company selling an asset may also apply for the reinvestment reserve.

The selling company may apply for the reinvestment reserve provided that the taxpayer has a clear intention of replacing the sold assets with assets that perform a similar function within the enterprise. Additionally, the reinvestment reserve only applies for qualifying business assets used in an enterprise (ie, no shares).

KRAAIJEVELD INTERNATIONAL
COPPUS TAX LAWYERS
LEGAL

Friggo Kraaijeveld **fkraaijeveld@kclegal.nl**
Ceriel Coppus **ccoppus@kclegal.nl**

WTC Tower H, 10th Floor
Zuidplein 88
1077 XV Amsterdam
Netherlands

Tel: +31 20 333 0130
www.kclegal.nl

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-075-9