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INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES

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THE NETHERLANDS: A NEW GATEWAY TO EUROPE FOR HONG KONG INVESTORS

The Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) continues to expand its tax treaty network, negotiating and concluding comprehensive double taxation agreements, after the decision to adopt the OECD standard on exchange of information.

Hong Kong is expanding its tax treaty network

After having concluded a double taxation arrangement with Mainland China (in force 10 April 1998) and important double tax treaties with Thailand (in force 7 December 2005), Vietnam (in force 12 August 2009), but especially with Belgium (in force 7 July 2004) and Luxembourg (in force 10 January 2009), new agreements were concluded with Austria, Brunei, Hungary, Indonesia, Ireland, Kuwait, Liechtenstein, the U.K. and the Netherlands.

The Netherlands – Hong Kong income tax treaty signed on 22 March 2010

One of the most important tax treaties in that respect is the first double tax treaty and protocol between the Neth-erlands and Hong Kong that was signed on 22 March 2010. For Hong Kong this
double tax treaty is the first tax treaty it concludes with an OECD-member country adopting the latest international standard on exchange of information.

In a press release of 6 July 2010, the Dutch Ministry of Finance announced that the Netherlands and Hong Kong have agreed upon a number of changes, by means of an exchange of notes, to the tax treaty and protocol.

Effective as of 1 January 2011 in the Netherlands and as of 1 April 2011 in Hong Kong

It is expected that the treaty, once ratified, will have effect as of 1 January 2011 in the Netherlands and as of 1 April 2011 in Hong Kong.

Main benefit: repatriation of worldwide profits to Hong Kong without taxation

It is expected that the new treaty will further increase mutual investments. The double tax treaty offers significant tax benefits to resident entities of both the Netherlands and Hong Kong.

The main benefit is that the treaty, once in force, allows investments from Hong Kong (and indirectly China) into the rest of the world in a way that profits can be repatriated to Hong Kong without (withholding) tax.
By virtue of the extensive tax treaty network of the Netherlands, the fact that it is an EU member state and has a favourable participation exemption, Hong Kong investors may be able to establish an intermediate holding company in the Netherlands for their European investments and repatriate profits from the source country without taxation.

The Netherlands: an advantageous base

Consequently, the position of the Netherlands as an advantageous base for an intermediate holding company is further enhanced and the Netherlands may become the new gateway to Europe (and the rest of the world) for Hong Kong investors.

Dividend withholding tax may be reduced from 15% to 0%

At this moment, no withholding tax is due on dividends distributed by a company resident in Hong Kong to its Dutch parent company, whereas a 15% dividend withholding tax applies on dividends distributed by a Dutch company to its Hong Kong parent company.

Please note that this 15% Dutch withholding tax on dividends distributed by the Dutch company to its parent resident in Hong Kong may currently be avoided by interposing a Dutch cooperative between the Dutch private limited liability company and the parent resident in Hong Kong. For this reason, Dutch cooperatives are now frequently used as international holding entities instead of Dutch private limited liability companies (*"Besloten Vennootschap"*or *"BV").* This will also be possible under the new treaty. In both cases the Dutch non-resident taxation based on the substantial shareholding ("*aanmerkelijk belang*") rules laid down in the Dutch corporate income tax act should be carefully monitored.

Under the tax treaty, the Dutch withholding tax rate on dividends distributed to qualifying Hong Kong residents that are the beneficial owner thereof is reduced from 15% to 0%, if the parent company of the Dutch company is:

1. A headquarter company for a multinational group resident in Hong Kong if they hold at least 10% of the capital of the company paying the dividends which provides a substantial portion of the overall supervision and administration of the group and which has and exercises, independent discretionary authority to carry out these functions.
2. A company resident in Hong Kong owning at least 10% of the share capital of the Dutch company and which shares are traded on a recognized stock exchange.
3. A company resident in Hong Kong owning at least 10% of the shares in the Dutch company and:
    a. The shares of the Hong Kong company are at least 50% owned by a company resident in Hong Kong, the Netherlands or an EU country which has concluded a treaty with Hong Kong with a 0% dividend withholding tax rate currently only Belgium and Luxembourg)

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   b. The shares of the parent company of the Hong Kong company are regularly traded on a recognized stock exchange
4. Banks or insurance companies and pension funds resident in Hong Kong if they hold at least 10% of the capital of the company paying the dividends.
5. Hong Kong government, government institutions, political subdivisions or local authorities.

No minimum holding periods apply. The competent authority of the Netherlands can also allow the 0% treaty withholding tax rate to apply if these conditions are not met but the Dutch company was not established, acquired of maintained with the main purpose of securing the 0% rate.

A 10% withholding tax rate applies to all other dividends

In all other cases, a 10% withholding tax rate applies.

A headquarter company

A company is regard as a headquarter company if (Art. VII Protocol):

- The corporate group exists of companies resident in, and engaged in an active business in, at least 5 countries and the business activities carried on in each of the 5 countries generate at least 10% of the gross income of the group; and
- Not more than 50% of its gross income is derived from the contracting party of which the company paying the dividends is a resident.

Royalty and interest withholding tax

The Netherlands does not levy a withholding tax on royalties.

The current withholding tax rate on royalties paid by a Hong Kong company to a Dutch company is reduced from effectively 4.95% to 3% under the new treaty.

Both countries do not levy a withholding tax on interest.

Capital gains

Currently, foreign resident entities holding more than 5% of the shares in a Dutch company might be subject to Dutch corporate income tax for capital gains realised upon the disposal of the shares of the Dutch company.

Under the new treaty however, Hong Kong resident entities will not be subject to Dutch tax for capital gains upon the disposal of their Dutch resident subsidiaries as capital gains are solely taxable in the State of which the alienator is a resident, except if the alienated asset qualifies as:

1. Immovable property situated in the other country
2. Movable property allocated to a permanent establishment in the other country.
3. Shares of a company if more than 50% of the value is derived from immovable property situated in the other country (with exceptions applying to for example shares quoted on certain stock exchanges).

Specific anti-abuse provision

A specific anti-abuse provision has been included in the double tax treaty, stating that nothing in the agreement shall prejudice the right of each state to apply its domestic laws and measures concerning tax avoidance, whether or not described as such.

For the Netherlands reference is made to non-resident taxation based on the substantial shareholding ("*aanmerkelijk belang*") rules laid down in the Dutch corporate income tax act.

Exchange of information

The treaty between Hong Kong and the Netherlands is the first treaty concluded by Hong Kong with an OECD member country which includes the latest international standard on exchange of information. The contracting parties are obliged to automatic or spontaneous exchange of information (Art. XI protocol).

This was an important requirement for the Netherlands during the negotiations.

The Netherlands: the new gateway to Europe (and the rest of the world) for Hong Kong investors

From the above it will be clear that, once the treaty will be ratified, the position of the Netherlands as an advantageous base for an intermediate holding company is further enhanced and the Netherlands may become the new gateway to Europe (and the rest of the world) for Hong Kong investors.

NETHERLANDS ANTILLES' BEARER SHARES TO BE HELD BY AUTHORIZED CUSTODIAN

On 15 June 2010 the National Decree on Custody Obligation of Bearer Shares (*Landsbesluit bewaarplicht toonderstukken*) was published in the Official Gazette of the Netherlands Antilles (Publicatieblad Aº 2010, Nº 36).

This Decree is an implementation of article 12-2 of the Law on the Supervision of the Trust Industry in the Netherlands Antilles (*Landsverordening Toezicht Trustwezen*; Publicatieblad Aº 2003, Nº 114), which obliges Netherlands Antilles trust offices to gather certain information about their clients.

All bearer shares to be held by an authorized custodian prior to 15 December 2010

In terms of this Decree, bearer shares of Netherlands Antilles companies should be held by an authorized custodian by 15 December 2010.

FATF Recommendations

The Decree was issued to comply with Financial Action Task Force (FATF) Recommendation 33: Transparency of legal persons and arrangements, as the Netherlands Antilles is keen to comply with the FATF Recommendation prior to the FATF audit of the Netherlands Antilles scheduled for 29 November until 10 December 2010.

Recommendation 33 is one of 40 Recommendations of this inter-governmental body (www.fatf-gafi.org/) whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. The Recommendations provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

Though not a binding international convention, many countries in the world have made a political commitment to combat money laundering by implementing the FATF Recommendations.

FATF Recommendation 33: Transparency of legal persons and arrangements

FATF Recommendation 33 requires that countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.

In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in FATF Recommendation 5.

However, no FATF Recommendation exists that either prohibits or advises against the issuance of bearer shares.

Other FATF Recommendations

Apart from FATF Recommendation 5 which covers customer due diligence and record-keeping in accordance with the 'Know Your Customer' principle, other Recommendations that have been taken into account in connection with Recommendation 33 are FATF Recommendation 13 and 16 regarding 'Measures to be taken by financial institutions and non-financial businesses and professions to prevent money laundering and terrorist financing'.

In accordance with Recommendation 13, a financial institution should be required, directly by law or regulation, to report promptly its suspicions to the Financial Intelligence Unit (FIU) if it suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing.

In accordance with Recommendation 16, Recommendation 13 should be made applicable to non-financial businesses and professions, including trust and company service providers, lawyers, notaries, independent legal professionals and accountants (unless the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege professional secrecy or legal professional privilege).

Netherlands Antilles Civil Code: the issue of bearer shares by a public limited liability company

Since the introduction of the new Netherlands Antilles act on corporate law (Book 2 Civil Code) on 1 March 2004 it is no longer possible that an Netherlands Antilles company directly issues bearer shares.

A public limited liability company ("*Naamloze Vennootschap" or "NV*") should first issue registered shares by way of a notarial deed of issuance that should be signed by the company and the subscriber.

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Only after the issuance and after the shares have been fully paid-up the registered shares may be converted into bearer shares. Other companies than an N.V. may not issue bearer shares. Bearer shares can not be acquired by persons and companies resident in the Netherlands Antilles.

Bearer shares and thus the ownership of the company are transferred by delivering them to the new owner. No transfer deed is required.

Under Netherlands Antilles international private law, the general rule is that the '*lex rei sitae*', i.e. the laws of the country in which the goods are actually located, determines who holds legal title to movable assets (under Netherlands Antilles law bearer shares qualify as such) and whether and how they may be transferred. Therefore the law of the country where the bearer shares are located determines whether and how they may be transferred.

Blocking certificates

In order to avoid that the trust office does not know who holds the bearer share it is common practice that trust offices require that a blocking certificate is signed wherein the holder of the bearer share confirms that the pertinent shares are not transferred or held in favour of a third party without informing the trust office. If the holder does not comply with this certificate, the trust office will not accept instructions from the new holder of the certificate.

Some trust offices even require that the bearer shares are held by them as custodian.

Custodian of bearer shares

The bearer shares should be held by the Netherlands Antilles trust office with a license by the Netherlands Antilles Central Bank (www.centralbank.an) that renders trust services to the pertinent company.

The trust office should have the bearer shares kept by a foundation that will be established for this purpose or by an institution as mentioned in the Decree.

Upon receipt, the trust office should issue a certificate of deposit to the holder of the bearer share.

It is possible that the trust office requests an external (foreign) custodian to keep the bearer shares subject to the issuance of a certificate of deposit by this external custodian in favour of the Netherlands Antilles trust office, wherein at the least the following should be mentioned:

- The identity and address details of the person or entity for whom the bearer shares are kept in custody with a confirmation that any change will be mentioned to the trust office.
- A declaration that the bearer share will not be released to a third custodian before having informed the trust office.
- A declaration that the bearer share will not be transferred or held in favour of a third party without informing the trust office.

This external (foreign) custodian may be:

- A foreign office of the trust company or a foreign affiliated company within the group.
- A foreign trust office, bank or financial institutions which is similarly supervised by the authorities of their country of residence.
- A foreign notary's office which is supervised by the authorities of their country of residence.

Not complying with the regulations of this Decree will be sanctioned with an administrative fine.

ITPS policy

In accordance with this new regulation, all bearer shares of companies that are serviced by ITPS (Antilles) N.V. or one of its affiliated companies should be delivered for custody to a representative of ITPS (Antilles) N.V. or ITPS (Netherlands) B.V. by 1 December 2010.

FAVOURABLE CHANGES TO THE NETHERLANDS ANTILLES TAX REGIME

Amendments to Profit Tax Ordinance enacted

On 29 December 2009, various amendments to the Profit Tax Ordinance (*Landsverordening op de winstbelasting 1940*) were enacted.

The amendments, which had been pending for a number of years, aim to bring the Netherlands Antilles tax legislation in line with the purposes of the Code of Conduct Group on Business Taxation of the European Union and to avoid that the Netherlands Antilles will considered to be a "tax haven".

Grandfathering of so-called offshore companies

The changes will only affect companies that are <u>not</u> considered to be offshore companies, i.e. companies that still have offshore tax rulings, which are applicable until 2019, based on which they are subject to only 3% profit tax.

With retroactive effect from 1 January 2009

The amendments apply with retroactive effect from 1 January 2009. During the financial year 2010, qualifying companies can still benefit from the previous regime.

The most important amendments concern:

(1) changes to the participation exemption,
(2) the tax exempt company and
(3) new rules for licensing activities and intergroup financing.

These amendments are described below.

1. Changes to the participation exemption

Under the participation exemption, subject to certain conditions, dividends from qualifying subsidiaries and capital gains realized on the alienation thereof are generally exempt from Netherlands Antilles profit tax.

Previous regime

The previous regime made a distinction between dividends and capital gains derived from shareholdings in Netherlands Antilles companies, Netherlands companies and other non-resident companies as follows:

- If derived from a Netherlands Antilles subsidiary, not being a Netherlands Antilles exempt company, a 100% exemption applied if the parent company owned at least 5% of the capital or voting rights of the subsidiary or the purchase price of the shares was at least ANG 1,000,000 (approximately USD 500,000).
- If derived from a Netherlands subsidiary, a 100% exemption applied if the parent company owned at least 25% of the nominal share capital of the Dutch subsidiary.
- A 95% exemption applied to profits from other non-resident companies. The remaining 5% was taxed at the standard rate of 34.5% leading to an effective tax rate of 1.73%. For the purpose of the participation exemption a Netherlands Antilles Exempt Company was considered to be a non-resident company.

New participation exemption regime

Under the new participation exemption regime the parent company should own at least 5% of the capital or voting rights of the subsidiary or the purchase price of the shares should be at least ANG 890,000 (approximately USD 500,000). So, the condition to consider a non-qualifying participation, i.e. shareholdings of less than 5%, as a qualifying participation on the basis of the cost price of the subsidiary is made less stringent.

Furthermore, there is no distinction anymore from whom the Netherlands Antilles company has received its profits. Moreover the 95% participation exemption will be abolished. A 100% exemption is generally available regardless where the subsidiary is located, i.e. whether in the Netherlands Antilles or abroad.

100% exemption

However, the following two tests must be met for the 100% exemption to be applicable:

1. A subject-to-tax test under which qualifying subsidiaries must be subject to a nominal profit tax rate of at least 10% (the subject-to-tax test); <u>and</u>
2. A non-portfolio investment test under which royalties, interest or dividend income of the subsidiary derived from activities outside the framework of a business may not exceed 50% of its total gross income (the non-portfolio investment test or activity test).

These tests are not applicable to subsidiaries that (almost) entirely own real estate.

The subject-to-tax test and the non-portfolio investment test should be performed on a consolidated bases. If a subsidiary itself has subsidiaries that are not consolidated in its financial statements, the taxpayer will be allowed to perform the tests as if these subsidiaries were look-through companies.

At his request, the taxpayer may apply these tests on the average of the gross income, respectively the taxable income, of the pertinent financial year and the two preceding financial years.

70% exemption

If the subject-to-tax test and the non-portfolio investment test are not met, a 70% participation exemption applies. Consequently the remaining 30% will be subject to tax at the standard 34.5% profit tax rate, resulting in an effective profit tax rate of 10.35%.

Dividends

A new definition of dividends is introduced, i.e. dividends are defined as distribution of profits that have been determined on the basis of the statutory financial statements, or have been distributed out of retained earnings by a company with a capital divided into shares.

The purchase price paid by a company for own shares, liquidation proceeds, repayment of paid-up capital and distributions of bonus shares are not considered dividends.

2. The tax exempt company

Another important change is the expansion of the scope of permitted activities of the Netherlands Antilles tax exempt company (the so-called "*Vrijgestelde Besloten Vennootschap*" or "*VBV*").

A VBV is a private limited liability company, which satisfies a number of legal requirements to be tax exempt, such as the kind of activities and the approval of the financial statements of the VBV by an independent expert.

Tax exempt companies may now also engage in licensing activities

Previously, a VBV could only carry on investments in shares, debt instruments, securities and deposits. These activities are now increased to include the licensing of intellectual property, industrial property, and similar assets in accordance with the laws of the Netherlands Antilles or other jurisdictions.

Stricter rules for tax exempt companies receiving dividends from foreign subsidiaries

However, this increase of activities is accompanied by stricter rules for VBVs receiving dividends from foreign subsidiaries, as follows.

Comparable profit tax

Foreign subsidiaries – not resident in the Netherlands Antilles, Aruba or the Netherlands - must be subject to a tax on its profits comparable to the profit tax of the Netherlands Antilles, which is deemed to be the case if it is subject-to-tax at a rate of 15% or is included in the list of comparable tax regimes published by Ministerial Decree on 29 December 2009.

This Decree provides that the EU Member States including the ultra-peripheral territories and the OECD Member States have such comparable regime. Dividends paid by a company established in a country which levies profit tax at a rate which is less than 15% are nevertheless deemed to be established in a country with a comparable regime if:

- the company is established in a treaty country and the applicable tax regimes is not excluded from treaty benefits; or
- the company is established in a country with which the Netherlands Antilles have signed a Tax Information Exchange Agreement (TIEA), and this country is included on the white list of the OECD and no special profit tax regime applies.

Declaration by an independent auditor

Moreover, unless the amount of foreign dividend income does not exceed 5% of the total income of VBV in that year, the company will need to submit to the Netherlands Antilles tax authorities a declaration issued by an independent auditor affirming that the dividends were subject to tax as an integral part of the company's annual accounts.

VBVs that are unable to obtain the required certification from the independent expert or which received dividends from companies located in no or low-tax jurisdictions exceed 5% of the total income of the VBV in a year, will be subject to profit tax at the regular profit tax rate of 30% (excluding 10% island surcharges) after the loss of the tax exempt status becomes irrevocable.

3. New rules for licensing activities and intergroup financing

The existing ruling policy regarding the taxation of non-risk bearing intra-group finance and licensing activities is partially codified, as follows:

- those activities are taxed on a cost plus basis; and
- the finance or licensing expenses are not included in the taxable base.

These new rules are not different from the ruling policy that applied in the Netherlands Antilles from 2003 to 2007.

ARUBA: AN ATTRACTIVE JURISDICTION FOR AIRCRAFT REGISTRATION

The private and corporate business jets industry enjoyed tremendous growth since 2000 in the wake of the 9-11. In 2007 worldwide annual sales of new jets exceeded 1,000 aircraft for the first time and order books for certain models are full for some years to come. Corporate aviation is increasingly providing the business community with a cost effective and time saving alternative to commercial travel with its reputation for delayed flights and security queues.

Main offshore aircraft registers

There are more corporate business jets registered in the U.S. than in any other country in the world, but quite a few of them are registered elsewhere. In recent years, offshore jurisdictions like Bermuda, the Cayman islands, the Bahamas, and Aruba have become recognised business addresses for corporate aircraft from many multi-national companies as their location makes them geographically accessible for U.S. corporations. Moreover, there are other considerations to take into account.

Main consideration for offshore aircraft registration

The main considerations in determining whether registration in an offshore country works for international aircraft operations include the following:

1. Confidentiality

Offshore registration is generally confidential and not available as a matter of public record, whilst aircraft ownership in most countries is a matter of public record and available on the internet.

2. Security

There are times when a lower profile flag than registration in the U.S.A. is needed for political reasons. Such security considerations are very important and will only become more important in the future.

3. Tax

Depending where the aircraft owner is taxable and where the aircraft will be operated, there may be tax advantages to offshore registration.

4. Certification regulations

Aircrafts that have not been certified to the standards of the European Aviation Safety Agency or EASA (see: www.easa.europa.eu) may not be able to be registered in an EU country but could be registered in certain offshore countries if the aircraft have been certified by the Federal Aviation Administration or FAA (see www.faa.gov) in the U.S. and are eligible for an FAA Certificate of Airworthiness. An example of this type of aircraft is the Lear 35.

5. Liability

Offshore corporations that own offshore-registered aircraft might reduce their liability exposure. Aircraft owners should however carefully consult with their own liability counsel regarding their individual circumstances.

Offshore aircraft register in Aruba

In recent years, Aruba has become a recognised business addresses for aircraft registration. Aruba is a Category 1 country rated by the US FAA and the International Civil Aviation Organization or ICAO (www.icao.int). Aruba, as an overseas territory and autonomous country within the Kingdom of the Netherlands; member of the European Union, it follows EASA standards with some deviations. However, since Aruba is geographically located in the Americas, the Aruban Department of Civil Aviation ("DCA") is knowledgeable and endorse to some extent the US FAR's regulations. Due to its well established European legislation and its high degree of assurances, banks, leasing companies and private operators, when it comes to the security of its assets, have chosen Aruba over other jurisdictions.

Two public registers

In fact Aruba has two public registers; the Aruban Nationality Register ("NR") and the Aruban Register of Registered Aircraft ("ARR").

Aruban Nationality Register

By way of registration of the aircraft in the NR, an administrative register kept at the Department of Civil Aviation ("DCA") (www.airsafetyfirst.com), the aircraft itself will have the Aruban nationality, regardless of its place of operation. It is possible to operate the aircraft outside Aruba, but the aircraft is always subject to periodical inspection of the Aruban DCA.

In order for the aircraft to be registered it should be owned by or leased to a resident of Aruba or a legal entity having its corporate seat in Aruba. If the aircraft is registered by a lessee (or fiduciary) the obligations imposed on an owner of an aircraft shall be fulfilled by the lessee of such aircraft.

The legal Aruban entity is usually an Aruba Exempt Company ("*Arubaanse Vrijgestelde Vennootschap*" or "*AVV*") or a limited liability company (*"Naamloze Vennootschap"* or *"NV"*) with transparent status.

Prior to registration in the NR, the aircraft needs to be inspected by inspectors of the DCA. After the aircraft has been duly inspected and the aircraft meets all the requirements of the DCA, the DCA will issue the required certificates and licenses for the registration, such as the Airworthiness Certificate, Aircraft Registration License, Radio Station License and Noise certificate.

In the NR there are registered national airliners, large to small business jets, and several rotor aircraft belonging to leasing companies, VIP operators, and private owners.

Aruban Register of Registered Aircraft

Once the aircraft has become an Aruban aircraft by registration in the NR, proprietary rights, such as ownership, mortgage or lease, can be registered in the Aruban Register of Registered Aircraft ("ARR"), a Civil Public Register of the Mortgage Office. By way of registration at the ARR, the aircraft becomes a registered property ("*registergoed*"). The registration of an aircraft in the Civil Public Registers kept at the Mortgage Office must be approved by a Judge of the Court in First Instance in Aruba.

If an aircraft is only registered in the NR and not registered in the ARR, the aircraft will be deemed movable and unregistered property in accordance with Aruban laws and consequently the holder of the aircraft is deemed owner, unless proven otherwise.

Once the aircraft has become registered in the ARR, lease agreements can be registered at the ARR and the aircraft can be subject to a mortgage. For a mortgage deed to be in effect, a mortgage deed needs to be passed in front of a civil law notary in Aruba and registered with the ARR. The mortgage deed should be governed by the laws of Aruba.

Legal entities owning or leasing the aircraft

As mentioned above, the legal Aruban entity that typically owns or leases the aircraft is an Aruba Exempt Company or a limited liability company with transparent status.

Tax treatment

Traditionally an Aruba Exempt Company was used for the registration of an aircraft in Aruba. However, in January 2006 the Aruba government introduced changes in the AVV legislation. The leasing of an aircraft under this new AVV regime may still occur free of tax if certain conditions are met.

For tax purposes there are two alternatives:

1. Fiscal transparency of NV's and AVV's

Newly incorporated Aruba limited liability companies and Aruba Exempt Corporations can opt to be considered transparent for Aruba profit tax, income tax and dividend withholding tax purposes.

In order to obtain this treatment, a notification for fiscal transparency should be submitted with the tax inspector at the time of incorporation. This notification should meet a number of requirements.

As a result hereof, the Aruba tax authorities will disregard the existence of the entity for tax purposes in Aruba. The sources of income of the NV and AVV are - like a partner-ship - allocated to the shareholders of the entity.

OECD definition of permanent establishment

A foreign shareholder can only be taxed in Aruba if the activities performed by the entity form a permanent establishment. The definition of a permanent establishment in accordance with the OECD Model Tax Convention is: 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. The OECD Model Tax Convention explicitly includes as being a permanent establishment: a place of management; a branch; an office; a factory; a workshop, and a place(s) of extraction of natural resources.

Based on the OECD definition, a permanent establishment shall be deemed not to include activities of a preparatory or auxiliary character. According to the OECD Commentary 2003, the decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole.

Consequently, if preparatory or auxiliary activities of the foreign shareholder are conducted in Aruba, the income of the transparent company should not be taxed in Aruba.

Safe Harbor rules

The Aruba tax authorities have stipulating Safe Harbor rules regarding the recognition of a permanent establishment in Aruba. According to these rules the following items should not constitute a permanent establishment:

- Keeping and safeguarding the books by a trust office in Aruba;
- Keeping one or several bank accounts of the transparent company at a bank located in Aruba;
- Ownership of intangible assets registered in Aruba;

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- Ownership of intangible assets not physically present in Aruba (e.g. airplanes, ships), even if assets are registered in Aruba ; and
- Holding of shares in a company established in Aruba;

2. Imputation Payment Company (IPC)

The IPC regime is attractive for the establishment of an airline company with substance in Aruba.

Overall tax burden could be as low as 2%

An IPC is a regular limited liability company that is subject to Aruba profit tax at the regular profit tax rate of 28%. However, the shareholder(s) of a qualifying IPC are entitled to an imputation payment by the Aruba government of 26/72 of the distributed dividends, if the company conducts one or more qualifying activities and fulfills certain other requirements. Because of this refund, the overall profit tax burden on the aviation activities could be as low as 2%.

Qualifying activities

Conducting an aviation company is considered a qualifying IPC activity. The following activities could qualify under aviation activities as mentioned in the IPC legislation:

- the transportation of person or goods;
- ground handling activities, e.g. refueling, airplane maintenance, baggage handling activities;
- leasing of airplanes in case of financial lease.

Aruba: an attractive jurisdiction for aircraft registration

It is clear from the above that Aruba is an attractive jurisdiction for aircraft registration. The Aruban tax and legal system contains attractive facilities for aircraft registration and the establishment of an airline company.

BRUSH-UP: THE BELGIAN NOTIONAL INTEREST DEDUCTION

Under the notional interest deduction, Belgian companies and Belgian branches of non-resident companies are entitled to deduct a deemed interest expense in connection with qualifying equity which is currently 3.8%.

Consequently, the notional interest deduction may create a tax lowering effect to many companies. In particular for equity intensive activities (e.g. group financing, intellectual property, etc.) this will lead to a quite a low effective tax rate.

The notional interest deduction scheme was launched in Belgium in 2006 as an answer to the existing scheme of coordination centres which will die out this year. It proves popular as already a number of foreign companies, like Volkswagen and GDF Suez seem to be benefiting from it.

Notional Interest Deduction - concept

The deduction for risk capital or more commonly called “notional interest deduction” (“NID”) allows all companies subject to Belgian corporate tax to reduce their taxable base when making investments from their own resources, i.e. to deduct from their taxable income a deemed interest calculated as the qualifying equity multiplied by the applicable NID rate.

The measure is valid as of the tax year 2007, i.e. the accounting year ending on 31 December 2006 or later in 2007.

Purpose

The main purpose of this innovative measure is to reduce the tax discrimination between debt financing and equity financing. In the case of loan capital, the interest paid is deductible from the taxable base, while with equity capital the dividends are taxable.

With the gradual disappearance of the special tax schedule for Belgian coordination centres, Belgium had to provide another tax schedule allowing the further development of these types of coordination activities. The scheme was also introduced to reduce of the effective corporate tax rate for all companies and a higher return after tax on investment, to promote capital-intensive investments in Belgium and as an incentive for multinationals to examine the possibility of allocating such activities as intra-group financing, central procurement and factoring to a Belgian group entity.

Scope of application

Eligible for the notional interest deduction are all companies that are subject to Belgian corporate income tax or non-resident corporate income tax (i.e. permanent establishment; Belgian real estate income).

This means that the measure is applicable to Belgian companies, Belgian branches of foreign companies, non-profit organisations (international or national) and foundations subject to Belgian corporate income tax, foreign companies that own real estate located in Belgium or hold property rights in such real estate.

It excludes companies that already benefit from certain other advantageous tax rules, such as recognised Belgian coordination centres that still benefit from the tax regime allowed by Royal Decree No.187 of 30 December 1982, companies located in a reconversion zone, as long as they benefit from the measures contained in the Act of 31 July 1984, investment companies (e.g. Sicavs), cooperative companies constituted in the context of workers participation, shipping companies applying the "tonnage tax" and small and medium enterprises "(SME's) choosing to set up an investment reserve.

Notional Interest Deduction = Notional interest rate x adjusted equity

The principle is very simple. The amount that can be deducted from the taxable base equals the fictitious interest cost on the adjusted equitycapital, or simply:

Notional Interest Deduction
=
Notional interest rate x adjusted equity

Examples

In the first example (tax year 2010, i.e. accounting year ending on 31 December 2009 or later in 2010), the balance sheet of the Belgian entity shows that the share capital has been used for group financing. With the application of an intra-group interest rate of 5%, the profit before taxes is 500.

Before the introduction of the notional interest deduction, the corporate tax would have been 169.95 (or 33.99%). Thanks to the notional interest deduction, the effective corporate tax to be paid is 17.91 (or 3.58%) only.

Example 1

Assets		Liabilities	
Group financing	10,000	Share capital	10,000

Profit and loss account	Without notional interest deduction	With notional interest deduction
Profit before tax	500.00	500.00
Notional interest deduction (4.473%)	-	-/- 447.30
Taxable	500.00	52.70
Corporate tax (33.99%)	169.95	17.91
Effective tax rate	33.99%	3.58%

Example 2

Assets		Liabilities	
Business assets	10,000	Share capital	10,000

Net result (return on equity)	Effective tax rate
≤ 4.473%	0%
5%	3.58%
8%	14.99%
10%	18.79%

The second example illustrates the result obtained for another operational Belgian company in the production field or in any other business, this time using a different approach. As long as the net result (return on equity) is equal or lower than the notional interest rate, no corporate tax will have to be paid.

The effective tax rate corresponding to different rates of return on equity can be found in the following summary table.

The qualifying equity (adjusted equity capital)
The calculation of the tax deduction will begin with the equity capital, as stated in the company's opening balance sheet for the taxable period. According to Belgian accounting law, equity capital includes capital, share premiums, revaluation gains, reserves, carry-forward of profits or losses, and capital investment subsidies.

This equity capital will be adjusted by eliminating a number of amounts to obtain the adjusted or qualifying equity. The latter will form the basis for the calculation of the deduction. The following amounts are to be eliminated:

- The fiscal net value of own shares held on the balance sheet.
- The fiscal net value of financial fixed assets qualifying as "participations and other shares" (non-portfolio participations).
- The fiscal net value of shares issued by investment companies (income fulfilling the conditions for the Belgian participation exemption).
- The net equity assigned to foreign permanent establishments or real estate property or rights. This only concerns the establishments and real estate situated in a country with which Belgium has concluded a tax treaty
- The net book value of tangible fixed assets, if costs do not unreasonably exceed professional needs
- The book value of tangible fixed assets that are considered as an investment not acquired in order to produce a regular income.

- The book value of real estate where its use is granted to directors, their spouses or children
- Tax-free revaluation gains and capital subsidies.

These adjustments are aimed at avoiding duplicate use and abuse, as examples show. Dividends and capital gains derived from shares are normally already eligible for the participation exemption. Profits of a permanent establishment and real estate located in a country with which Belgium has concluded a tax treaty are tax-exempt in Belgium. Private assets, such as jewellery or art work, could artificially boost a company's equity.

Any change to one of the components of the qualifying equity during the taxable period is taken into account on a prorate basis. Changes, upwards or downwards, are re-corded as of the first day of the calendar month following the month in which they took place.

The rate
The fictitious interest rate to be applied to the adjusted equity capital is equal to the annual average of published interest rates for 10-year Belgian government bonds (OLO's) over the year taken two years before the fiscal year concerned (e.g. the average of the interest rates of 2008 for fiscal year 2010) (see: http://debtagency.be/nl_products_olo.htm). This rate will be revised annually.

Applying the fictitious interest rate to the adjusted equity capital produces the amount that can be deducted from the taxable base, i.e. the notional interest deduction.

The notional interest rate is not allowed to deviate more than 1% from the rate of the previous tax year and must not exceed 6.5%. These limitations may however be amended by a Royal Decree submitted to the Council of Ministers.

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If the financial year of a company is shorter or longer than 12 months, the reference notional interest rate is multiplied by the number of days in this financial year and divided by 365. SME's are entitled to an upgrade of 0.5%. A company qualifies as an SME if it meets the criteria mentioned in Article 15, paragraph 1 of the Belgian Company Code.

The notional interest rate for tax year 2010 (i.e. accounting year ending on 31 December 2009 or later in 2010) is 4.473%. It has even been increased to 4.973% for SME's.

At the occasion of the annual budget negotiations in October 2009 the federal government decided that the maximum notional interest deduction rate for assessment years 2011 and 2012 (accounting year 2010 and 2011) would be fixed at 3.8%.

Special features

Special features of the notional interest deduction include the following:

- If the company makes insufficient profit, the deduction can be carried forward to the following seven years.
- The notional interest cannot be deducted from received abnormal or gratuitous benefits, and in case of a change of control of a company, the carry-forward privilege is only maintained when such a change can be justified for financial or economic reasons.
- No acknowledgement is required for the notional interest deduction to apply, and the notional interest deduction regime does not preclude a company from performing a particular business activity.
- No thin capitalisation provisions apply to qualifying equity.
- No condition of investment in intangible or tangible assets, nor of blocking or freezing the amount on a separate account of the company's balance sheet applies.
- No withholding tax on the notional interest deduction.
- Dividends paid out of the amount of notional interest deduction normally qualify for EU Parent-Subsidiary directive and double tax treaties.
- The only formal condition to comply with is the completion of an enclosure with the corporate tax return.

CFC and home country regulations

For international companies, an essential aspect is to determine whether the home country, if it is outside Belgium, could annul or reduce the advantage of the notional interest deduction. The so-called "controlled foreign corporation" (or CFC) legislation of other countries, in particular, have to be taken into account.

It is not the aim of this article to give an overview of such, sometimes complex, legislation that diverges greatly from one country to another. However, taking into account the many tax treaties Belgium has concluded, as well as EU law and EU fundamental freedoms, it has to be said that adverse consequences simply do not exist in many countries. For the few countries where they do exist, they can be avoided by using explicit exceptions or appropriate planning.

Advantages

From the above it will be clear that:

- The notional interest deduction is a valuable tool to maintain or even locate in Belgium activities which were previously allowed under the special tax regime of Belgian coordination centres.
- It creates a considerable tax benefit for companies that have good solvency ratios, reducing the taxable base and generating a higher return after tax.
- It provides flexibility, because it is possible to carry forward any unused amount of the deduction.
- It is a permanent incentive and not just a one-shot advantage.
- It strengthens the financial position of Belgian companies and branches by encouraging them to increase their equity.
- It is an incentive to retain earnings in the Belgian entity and to use these to finance new investments.
- For international groups, it opens possibilities for allocating new activities to a Belgian entity such as intra-group financing, central procurement or factoring.

Belgium: an attractive location for capital-intensive companies, equity-funded headquarters and treasury centres

The notional interest deduction combines with the extensive treaty network concluded by Belgium, the tax regime for expatriates, the access to European Directives and the Belgian ruling practice makes Belgium an attractive location for capital-intensive companies, equity-funded headquarters and treasury centres.

THE USE OF "OLD" NETHERLANDS ANTILLES OFFSHORE (SHELF) COMPANIES

As mentioned in the article about the favourable changes to the Netherlands Antilles tax regime, there are still so-called "offshore companies" that have favorable offshore tax rulings, which are applicable until 2019, based on which they are subject to only 3% profit tax in accordance with the old offshore regime. This old offshore regime was terminated in 1 July 1999.

Currently the Netherlands Antilles tax authorities apply the rules about these offshore rulings more strict.

Accordingly, the applicability of these rulings will terminate in 2019 or at an earlier stage if:

1. The company has ceased its activities <u>and</u>
2. The ownership of the company has changed.

Sometimes trust offices are still selling offshore shelf companies to clients. It should be noted that those shelf companies can only benefit from the old offshore regime if they:

1. Have been incorporated before 1 July 1999 <u>and</u>
2. Were not active on 1 July 1999 <u>and</u>
3. Have not become active since 1 July 1999.

Since these companies have never been active, they can not be considered to have ceased their activities. Therefore they can be sold as an offshore shelf company and can undertake activities that will benefit from the old offshore regime until 2019, or at an earlier stage as mentioned above.

Consequently, offshore companies that since 1 July 1999 have been repurchased by trust offices can not be resold as offshore shelf companies.

The ITPS Group

INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES

ITPS GROUP PROFILE

Needs of clients
As business is becoming more international, organizations are seeking ways to minimize the incidence of taxation linked to it. On the other hand, organizations as well as individuals are seeking international ways to optimize their profits and to protect their assets. The increasing complexity of (tax) laws necessitates careful planning and consideration of the structure to be established and maintained. Customers require highly specialized professional services.

Mission
The purpose of ITPS is: doing the best the things that the customer values most. The focus is long term customer satisfaction.

The mission of the ITPS Group is to create value for it's customers through the provision of professional services in the field of international tax planning and structure, designed to optimize the customer's after tax profits.

Services
The objective of ITPS is to meet customer needs for international tax planning and structure by rendering "total offering" services with the highest standards of professional and personal service combined with complete confidentiality.

This comprehensive offering comprises not only the advice for international tax planning (i.e. for legal and tax questions), but also implementation to establish and maintain structures.

These services include, but are not limited to:
- International tax planning;
- Company formation, registered office facility, management, accounting and tax compliance;
- Trust and foundation formation and administration;
- Licensing and sub-licensing of intellectual property rights.

The services ITPS does not provide, but which we are rendered by correspondents, include auditing, legal opinions, litigation and portfolio investment.

Clients
The client base of ITPS consists of prominent individuals, including sportsmen and artists, small to large companies, including other professional firms, but also multinational (stock quoted) companies.

Why you should use ITPS
The ITPS Group holds an unique position in each of these jurisdictions for the following reasons:

1. Market oriented (and not product oriented):
ITPS focuses on meeting the needs of the clients;

2. Rendering international tax planning and structure (trust) services:
Tax planning and structure services are complementary. Planning is of no use if you do not structure it. Moreover you can not efficiently structure if you do not take the first step: plan the structure. Therefore, the services of ITPS are not restricted to trust services. Since ITPS has the combined skill and experience for more than ten years, high quality is ensured;

3. All included fixed fees for structure (trust) services:
In each jurisdiction, tax structure services are charged at annual fixed fees, generally payable in quarterly installments in advance.
Tax planning services are charged at an hourly rate;

4. One contact person is possible for several jurisdictions;

5. Independent:
There is no conflict of interest. ITPS works with all other skilled professionals and (financial) institutions as the client deems appropriate;

6. Personal contact and continuity:
ITPS focuses on long-term customer satisfaction, providing proactive, personal, attentive and competent services;

7. Regular meetings:
Customers and correspondents are visited on a regular basis (three to four times a year) to touch base and to discuss opportunities and problems that may have arisen, without a fee being charged;

8. Tax sparring and education:
ITPS strives to built up a (tax) sparring relationship with customers and correspondents in order to keep each other abreast in a fast changing environment. A quarterly newsletter on international tax planning, the International Tax Planning Newsletter, is sent to inform customers and correspondents on the changes in legislation;

9. An excellent network:
Since ITPS is not part of an international network, it has built up a network of highly skilled professionals to work with.

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