The Netherlands

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1. NON-TAX ISSUES

1.1 Domestic law

1.1.1 Introduction

The laws of succession are included in Book 4 of The Netherlands Civil Code and came into effect on 1 January 2003. Wherever reference is made to a 'spouse' in Book 4 of The Netherlands Civil Code this includes a registered partner.

1.1.2 Succession law

If the deceased has not made a testamentary disposition in which he has stipulated otherwise, the estate of the deceased is divided in accordance with the general rules of succession as set forth in the Civil Code. According to these rules the primary heirs are the spouse and children of the deceased. If there are no spouse and/or children nor any substitutes for them, the subsequent heirs are the parents and siblings of the deceased followed by the grandparents and great grandparents.

In principle the heirs inherit equal parts of the estate. However, in order to enable the surviving spouse to maintain the same standards of living as prior to the death of the deceased, the spouse receives all the assets of the estate and has the obligation to pay all debts of the estate. The children receive a claim in cash on the surviving spouse. The claim of the children is not payable until the surviving spouse dies, is declared bankrupt or is granted a statutory debt adjustment.

1.1.3 Testamentary disposition

A testamentary disposition is laid down in either (i) a notarial deed executed before a Dutch civil law notary, or (ii) a private deed that is deposited with a Dutch civil law notary. Further, the deceased can determine in a handwritten document how certain personal assets (such as jewellery, clothes) should be divided.

A closed system applies. Only issues that fit within the system of the Civil Code can be dealt with in a testamentary disposition. These issues include:

- revoking a previous testamentary disposition;
- naming heirs;
- making bequests *(legaat)*;
- testamentary dispositions subject to conditions; and
- naming an administrator *(bewindvoerder)* and executor.

1.1.4 Forced heirship

Regardless of the contents of the testamentary disposition, the descendants of the deceased (or their substitutes) are entitled to receive a forced heirship share *(legitieme portie)*. The forced heirship share is calculated on a fictitious value of the estate. This fictitious value takes into account certain gifts made by the deceased prior to his death. The forced heirship share amounts to 50 per cent of the fictitious value of the estate divided by the number of heirs (spouse plus children). The forced share is a claim in cash only; a forced heir cannot claim goods that are part of the estate.

1.2 International private law

1.2.1 Treaties

The Netherlands has ratified the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons. This convention has not yet come into effect awaiting the ratification by two other countries, but has been incorporated in the laws of The Netherlands in 1996. The Netherlands is also a party to the Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions.

1.2.2 Laws applicable to succession

A person may designate the law of a particular state to govern the succession. The designation will be effective only if, at the time of the designation or of his death, such person was a national of that state or had his habitual residence there.

In the event that no designation of applicable law is made or the designation is invalid, the laws applicable to succession are determined as follows:

- succession is governed by the law of the state in which the deceased at the time of his death was habitually resident, if he was then a national of that state;
- succession is also governed by the law of the state in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the state of which he was then a national, the law of that state applies;
- in other cases succession is governed by the law of the state of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another state, in which case the law of the latter state applies.

1.2.3 Laws applicable to the settlement of the estate

No choice of law can be made regarding the settlement of the estate. If the deceased had his last habitual residence in The Netherlands, Netherlands law applies to the settlement of the estate. Netherlands law does not contain clear rules regarding the settlement of the estate for the circumstance that the deceased had his last habitual residence outside of The Netherlands.

1.2.4 Validity of foreign testamentary dispositions

Pursuant to the Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions, a Netherlands court will accept the validity of a testamentary disposition if the form complies with the internal law:

of the place where the testator made it; or

- of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death; or
- of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death; or
- of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death; or
- so far as immovables are concerned, of the place where they are situated.

2. TAXATION

2.1 Criteria for liability to main taxes

A starting point for the taxation of individuals is residence. Since there is no clear statutory definition of residence, tax residency of an individual is determined on the basis of facts. Based on case law the following elements are important to determine an individual's residency:

- where the individual has a permanent home;
- the abode of the individual and his family;
- place of bank accounts and/or investments;
- the place where someone is insured;
- the place of medical treatments;
- memberships of organisations; and
- place of cash withdrawals and /or credit card payments

Non-resident individuals generally only become subject to taxation on certain Dutch sources, such as Dutch employment income, income from at least 5 per cent interests in Dutch companies and income from real estate situated in the Netherlands.

2.2 Taxes

2.2.1 Income tax

The Dutch income tax system consists of three separate tax regimes, the so-called boxes.

Box 1: includes income from employment and from business enterprises. Tax is levied at progressive rates ranging from 33.1 per cent to 52 per cent, including social security contributions. An individual´s main residence is also included in Box 1, which causes that mortgage interest paid on a loan to finance the main residence is generally deductible at these progressive income tax rates.

Box 2: consists of income and capital gains from substantial interest shares. A substantial interest is generally present if an individual holds a stake of at least 5 per cent in a company with a capital divided into shares, such as a private limited liability company (a BV). Tax is levied at a flat 25 per cent. A deemed 4 per cent return should be taken into account in case of a substantial interest in a low taxed investment company, which leads to an effective annual 1 per cent. It should be noted that realised returns exceeding this deemed 4 per cent are also taxed with 25 per cent income tax.

Box 3: consists of income from savings and investments. An annual deemed return of 4 per cent of the savings and investments is taxed at 30 per cent, leading to an effective annual 1.2 per cent wealth tax. Unlike in the case of Box 2, there is no further income tax on the actual return realised on the Box 3 investments. This is why taxation in Box 3 is generally very favourable.

2.2.2 Inheritance and gift tax

Inheritance tax is levied on the value of the estate of an individual that was resident or deemed resident of the Netherlands. Gift tax is levied on gifts that are made by a Dutch resident or deemed resident donor. As of 1 January 2009 the transfer duty on any Dutch situs property held by a non-resident has been abolished.

As of 2010 the top rate for spouses and children was reduced to 20 per cent (was 27 per cent). The first bracket amounts to 10 per cent for the first EUR 115,708. For other recipients the top rate is 40 per cent (was 68 per cent). The first bracket for these recipients is 30 per cent for the first EUR 115,708.

A Dutch national that is resident outside the Netherlands is still deemed to be a resident of the Netherlands for inheritance tax and gift tax purposes if he dies, or makes a gift, within 10 years from moving residence from the Netherlands. A non-Dutch national is deemed to be a resident for gift tax purposes on any gifts made within one year from moving residence from the Netherlands.

Assets that are inherited by, or gifted to, recognised charitable organisations are not subject to inheritance tax or gift tax.

Subject to detailed conditions, an 83 per cent exemption applies on business assets, including substantial interest shares in active businesses. The first EUR 1 million of such business assets is fully exempt from inheritance or gift tax.

2.2.3 Corporate income tax

Corporate income tax is levied on profits of corporate entities such as an NV or a BV. The statutory tax rate is 25 per cent. For profits up to EUR 200,000, the rate is 20 per cent (2012).

2.2.4 Property tax

On a municipal level, the use and ownership of real property are taxed. The tax is dependent on the municipality and on the value of the property.

Upon acquisition of real estate a 6 per cent transfer tax is due by the acquirer of the property. This 6 per cent transfer tax is also due in case of acquisition of a substantial interest (generally 33 1/3 per cent) of shares in certain companies holding Dutch real estate.

2.2.5 Value added tax

VAT is levied on the delivery of goods and services. The general rate is 19 per cent. The low rate for the delivery of certain vital goods and services amounts to 6 per cent.

2.2.6 Other taxes

Employers must withhold wage tax on salaries paid to employees. This wage tax is an advance levy to Box 1 income tax.

Dividends paid by a Dutch company to its shareholders are generally subject to 15 per cent dividend withholding tax. This rate is often reduced on dividends to corporate shareholders that are resident in countries with which the Netherlands has concluded a tax treaty. Resident shareholders can credit the withholding tax against their income tax due.

The Netherlands does not have a withholding tax on interest and royalties.

2.3 Enforcement and collection of taxes

Income tax is levied based on tax returns filed by the individual. The tax assessment issued can be provisional and final. A final assessment must in principle be issued within three years from the end of the tax year. Additional assessments are possible if new facts become available within five years from the end of the tax year. For foreign source income the statute of limitations is even extended to 12 years.

In case of inheritance tax, the above mentioned 3, 5 and 12 year statute of limitations will generally start as of the day in which the death is registered in the public register.

If no gift tax return is filed, the 3, 5 and 12 year statute of limitations will start to run only after the registering of the death of the donor or donee in the public register. The statute of limitations on gifts made by body corporates is even extended to 20 years from the date of gift.

Non-compliance with correct filing obligations can lead to penalties up to 100 per cent of the tax amount due. The actual penalty percentage is determined on a case-by-case basis.

3. EXEMPTIONS AND/OR EXIT TAXES FOR NEW IMMIGRANTS AND EMIGRANTS

3.1 Taxation of immigrants to the Netherlands

3.1.1 Thirty per cent ruling

As from the date of becoming a Dutch resident, the immigrating wealthy individual will become subject to income tax on his worldwide income (see 2.2.1 above). For individuals that are still active, the Dutch income tax bill can be reduced substantially through application of the expat regime, the so-called 30 per cent ruling. Subject to certain recently overhauled conditions, a deemed 30 per cent deduction is applied on the salary of the individual that is taxed in Box 1. This salary could in principle also be paid by a wholly owned subsidiary.

The main advantage of the 30 per cent ruling for wealthy individuals is however that one can opt for deemed non-residency for sources of income that fall within Box 2 and Box 3. Through this election income from portfolio investments and non-Dutch substantial interest shares can effectively be exempt from Dutch taxation, such that the Netherlands income tax system is often even more advantageous than countries such as the United Kingdom and Switzerland.

The basic term during which the 30 per cent ruling applies is eight years.

3.1.2 Step up in basis of assets

Another planning tool is the step up in basis facilities, such that substantial interest stakes in companies can be revalued to their fair market value when becoming a Dutch resident. Through future capital repayments the Dutch Box 2 income tax can generally be avoided whilst Dutch resident.

3.2 Taxation of emigration from the Netherlands

An individual who moves his residency from the Netherlands, and who owns an at least 5 per cent stake in a company with a capital divided into shares, will receive a conservative income tax assessment for the 25 per cent Box 2 tax on the deemed capital gain that is present at the time of emigration. Extension for payment of the income tax is granted for a period of 10 years. After this period, the assessment is waived. If the individual emigrates to a country outside the EU, security will have to be provided for the amount of the tax payable on the conservative tax assessment.

If the shares are sold within this 10-year period, or at least 90 per cent of the company's reserves are distributed, the extension for payment of the conservative tax assessment will lapse, and the income tax amount will thus become due.

No conservative tax assessment will be issued on a substantial interest in a non-Dutch company if the individual emigrates within eight years from becoming a Dutch resident, and if the individual has not lived more than 10 years in the Netherlands during the past 25 years.

It is important to note that under the Dutch tax treaties, the Netherlands has generally reserved its right to levy income tax on any capital gains that are realised on Dutch substantial interest shares within five years from the individual's emigration from the Netherlands. This is thus a capital gains tax that is also due on profits that have arisen after the emigration from the Netherlands.

4. USE OF ASSET HOLDING VEHICLES

4.1 Trusts and foundations

4.1.1 General

Although the Netherlands has ratified the Hague Trust Convention, the Dutch Ministry of Finance has for long taken the position that trusts are not recognised for tax purposes if that would lead to a situation of 'floating wealth', ie a situation where neither the settlor nor the beneficiaries would be subject to tax on the assets held in trust.

However, in November 1998 the Dutch Supreme Court ruled in two different cases that an irrevocable discretionary trust should indeed be treated as an entity that is separate from the settlor and beneficiaries for gift tax purposes. The Supreme Court ruled that when settling an irrevocable discretionary trust the settlor has lost actual possession and ownership of the settled assets. On the other hand the trustee does not have the assets in possession and the beneficiary just has a bare expectation and no enforceable right. Settlements to an irrevocable discretionary trust by Dutch resident or deemed resident individuals thus became subject to gift tax at the then maximum gift tax rate of 68 per cent.

The 1998 case law caused an increase of the use of trusts in cases where gift tax was not an issue, like in the case where the settlor was not a (deemed) resident of the Netherlands. The Dutch Ministry of Finance and tax authorities have claimed in a number of these cases that a situation of 'floating wealth', ie a situation where the assets of a trust or a foundation are neither taxed at the level of the settlor or founder nor at the level of the beneficiaries, should not exist for Dutch tax purposes. Since the efforts of the Dutch tax authorities in attributing assets held by trusts and foundations to the settlor/founder or beneficiaries have not always been successful, a new law was felt necessary and has entered into force on 1 January 2010. Pre-2010 cases are however still actively challenged by the Dutch tax authorities.

4.1.2 Changes as per 1 January 2010

The current law contains the following highlight features with regard to trusts and other comparable entities like foundations to avoid a situation of 'floating wealth':

- for Dutch income tax, gift tax and inheritance tax purposes, the assets and liabilities and the income and expenses of a trust are attributed to the direct or indirect settlor of a trust or founder of foundation. It should be noted that this only applies to the discretionary part of the entity. The non-discretionary part is generally attributable to the relevant beneficiary;
- distributions to the beneficiaries are as a result deemed to be gifts by the settlor or founder. If the settlor/founder is (deemed) Dutch resident, these distributions will thus become subject to Dutch gift tax;
- for income tax purposes the settlor or founder will be deemed to hold the assets and liabilities of the trust or foundation directly. For a Dutch resident individual it would mean:
  - 25 per cent income tax on dividends and realised capital gains on substantial interest shares (at least 5 per cent) held by the trust or foundation. The cost base of such shares would be the historic cost base as if the trust has never existed. The new law thus has a de facto retroactive effect;
  - progressive tax (max 52 per cent) on interest received on loans to direct or indirect substantial interest shareholdings;
  - an annual 1.2 per cent effective tax on other assets.

In case the settlor or founder has died, the assets and liabilities and income and expenses are attributed to the settlor's heirs; and

- only in the case that the settlor or founder, his spouse or the heirs cannot be determined, the attribution for tax purposes will be to the beneficiaries.

The above attribution rule does not apply for Dutch income tax purposes if it can be demonstrated that the trust or foundation is subject to a taxation that is considered reasonable according to Dutch standards. Generally an effective tax rate of 10 per cent qualifies. This exception therefore provides income tax planning possibilities. It should be noted that the exception does not apply for the attribution for gift and inheritance tax purposes.

4.2 Companies

The Netherlands is well known for its participation exemption regime that exempts capital gains and dividends from qualifying participations. As a result of the participation exemption, and the numerous and favourable tax treaties, a number of family owned multinational businesses have established a holding company in the Netherlands.

The participation exemption generally applies if the following main conditions are met:

- the Dutch holding company holds at least 5 per cent of the total nominal value of the shares of the participation; and
- the participation is not a low taxed portfolio investment company, unless it is involved in real estate activities.

The general 15 per cent withholding tax on profit distributions by the holding company is generally reduced to nil under the applicable tax treaty.

4.3 Tax exempt investment funds

4.3.1 Introduction

Until recently, Dutch investment funds could be established in three tax ways. Firstly as an ordinarily taxed entity but with the above-mentioned participation exemption on qualifying dividends and capital gains. Secondly, a fund can be established as a 0 per cent taxed fund. For this regime specific shareholder tests apply and an obligation to distribute income to the investors. These profit distributions are in principle subject to 15 per cent dividend withholding tax, subject to reduction of withholding tax under the Dutch treaties. The third way is through an entity that is treated as transparent for Dutch tax purposes, like for instance a limited partnership (a CV).

Since 2007 a fourth tax efficient alternative is offered for investment funds, which is competitive to the investment fund regimes of Luxembourg and Ireland, and even to offshore fund regimes like that of the Cayman Islands.

4.3.2 Main features

The main features of the tax exempt investment fund regime (*vrijgestelde beleggingsinstelling*) can be summarised as follows:

- *full exemption from Dutch corporate income tax*
- A qualifying investment fund is specifically exempted from Dutch corporate income tax (generally levied at a rate of 25 per cent);
- *full exemption from Dutch dividend withholding tax*
- A distribution of profits by the qualifying investment fund to its investors is also exempt from dividend withholding tax. This withholding tax exemption applies irrespective of the residency and stake of the investor;
- no specific shareholder tests

In the 'classic' 0 per cent investment fund regime specific shareholder tests need to be met. The new exempt investment fund regime does not have such tests, except for the requirement that it needs at least two shareholders each holding at least 10 per cent;

- no financing tests

- There are no limitations to the leverage used by the fund. Hedge funds that typically make use of leverage could thus qualify;
- no obligation to pay out income to the shareholders
- The tax exempt investment fund is not obliged to distribute any income or capital gains it realises.
- no capital duty on capital contributions to the fund
- The Netherlands has abolished its capital duty on equity contributions in 2006. Therefore, capital contributions to the fund are not subject to any capital duty.
- *no annual tax on the net worth of the fund*

In order to qualify for the tax exemption, the fund will need to meet certain conditions, and needs to receive an approval from the Dutch tax authorities.

4.4 A Netherlands incorporated foundation (STAK)

In Dutch and international tax structures a Netherlands incorporated foundation (*stichting*) is frequently used as an asset protection vehicle. Generally such foundation is set up as a STAK (*stichting administratiekantoor*) holding shares or other assets. Upon contribution of the assets to the STAK, the former holders of the assets receive depositary receipts issued by the STAK. Through this mechanism there is a clear separation of the voting rights and the beneficiary rights: the voting rights rest with the STAK, whereas the economic/beneficial ownership rests with the holders of the depositary receipts.

For Dutch tax purposes a STAK is in principle not subject to corporate income tax. In fact, the STAK is considered transparent for Dutch tax purposes so that any tax is levied at the level of the depositary receipt holders only. Subject to certain conditions, the contribution of assets to a STAK by Dutch tax residents is therefore not treated as a taxable transfer for Dutch income tax purposes.

It is also possible for a foundation not to issue depositary receipts, but instead to stipulate in its articles of association that its assets are held and its activities are performed for the benefit and risk of certain third parties. In such a case the foundation merely holds the legal title to the assets whereas the economic/beneficial ownership is in the hands of the third party. Such third party is then generally considered to be the owner of the asset for Dutch tax purposes. It is advisable to obtain an advance tax ruling in such a case of a foundation that does not issue depositary receipts.

5. PHILANTHROPIC AND CHARITABLE OPTIONS

Foundations are also often used as vehicles to perform charitable activities. These charitable activities can be performed both in and outside the Netherlands. Upon request, the Dutch tax authorities certify that the foundation is considered as a charitable institution (*algemeen nut beogende instelling, ANBI*) which will give rise to the following benefits:

- gifts to the charitable foundation are under certain conditions deductible for Dutch income and corporate income tax purposes;
- gifts to the charitable foundation are not subject to Dutch gift tax;

- gifts by the charitable foundation are also not subject to Dutch gift tax;
- inheritances received by the charitable foundation are not subject to Dutch inheritance tax; and
- the charitable foundation is in principle not subject to Dutch corporate income tax on any income it realises.

The above tax benefits are in principle also available for non Dutch established charitable entities, if these entities are established within the EU, the Netherlands Antilles, Aruba or any other jurisdiction with which the Netherlands has agreed on an exchange of information.

In order to be considered as a Dutch charitable foundation, or a qualifying foreign charitable institution, certain conditions need to be met and a request has to be filed with the competent Dutch tax authority.

Based on the above advantages for charitable institutions, a number of non-Dutch entities have moved to the Netherlands, or have now registered with the Dutch tax authorities.

6. REGULATORY ENVIRONMENT

6.1 Investment vehicles

Pursuant to the Financial Supervision Act (*Wet op het financieel toezicht*), participation rights with respect to investment funds can only be offered if its manager or the institution itself obtained a license from the Authority for the Financial Markets (*Autoriteit Financiële Markten*). However, there are several exemptions from this licence requirement. More in particular, a licence is not required if the participation rights:

- are offered to less than 100 persons (not being qualified investors);
- are offered to qualified investors only;
- can only be acquired for a counter value of at least EUR 100,000 by each separate investor; or
- each have a nominal value of at least EUR 100,000.

For any exemption to apply, it must be mentioned in all offering materials that the offeror is not required to have a licence and that it is not supervised by the Authority for the Financial Markets. If any of these exemptions applies, the (manager of the) investment fund is not required to have a prospectus in place which has been approved by the Authority for the Financial Markets (in connection with the offering of the participation rights qualifying as securities) either.

It is noted that most probably, the above-mentioned exemptions will disappear in the near future when the AIFM directive (European Union Alternative Investment Fund Managers Directive) is implemented in Dutch law. This directive may be implemented as soon as mid 2013. It is not entirely clear yet, which exceptions or exemptions will remain.

6.2 Anti-money laundering legislation

The Act on the Prevention of Money Laundering and Financing Terrorism became effective on 1 August 2008. It implements the Third Anti-Money Laundering Directive 2005/60/EC. Based on the law, a number of institutions, such as financial institutions, auditors, tax lawyers and other legal professionals need to identify a potential client, and in some cases verify the identity of a potential client. The client assessment is based on a risk based approach, where additional measures need to be undertaken if the risk of money laundering or financing terrorism is higher.

Any institution providing designated services is required to report unusual transactions to the Financial Intelligence Unit Netherlands. The institutions are under a legal obligation to keep any reporting confidential.

7. KEY PLANNING POINTS FOR LONG TERM RESIDENT FAMILIES

Long term Dutch resident families often have a stake in an active family business held through one or more Dutch holding companies. Dividends received from the family business are generally kept at the holding company level to avoid a 25 per cent income tax upon a distribution of dividends to the individual family member. In order to mitigate the corporate income tax on portfolio investments at the holding company level, it is possible to demerge the portfolio assets into a tax exempt investment fund (VBI), as summarised under 4.2 above. This demerger can under certain conditions be accomplished without triggering the 25 per cent Box 2 income tax at the level of the individual shareholder.

From an estate planning perspective, it is important to create a family business group structure that makes full use of the 83 per cent business assets exemption in case of a gift to the next generation or upon death.

In all planning for Dutch resident families, one should keep the potential international planning possibilities into mind, since it is not uncommon for wealthy Dutch parents to move abroad once the children have grown up.

8. KEY POINTS FOR MIGRATING AND TEMPORARILY RESIDENT FAMILIES

To mitigate Dutch income tax for temporarily resident families, the 30 per cent tax ruling as mentioned under 3.1.1 above provides for a good planning tool as it offers the opportunity to opt for deemed non-residency for Box 2 and Box 3 income tax. As a result during a period of eight years there is no 25 per cent Box 2 tax on income and capital gains on non-Dutch substantial interest shares and no Box 3 tax, effectively an annual 1.2 per cent wealth tax. Through this, the Netherlands is often even more advantageous on the income tax side than the United Kingdom or Switzerland.

Another income tax planning point is to create a step up in basis of substantial interest shares, so that income tax can be avoided in case of capital repayments. When moving out of the Netherlands within eight years from becoming a Dutch resident, no conservative tax assessment will be levied on such substantial interest shares.

From a Dutch gift and inheritance tax perspective, one should consider making revocable gifts prior to moving to the Netherlands.

9. FORTHCOMING LEGISLATION AND OTHER CHANGES

In order to reduce the increased government deficit, Dutch government is likely to enact certain measures to increase taxes in 2013. Although it is not clear what these measures will be at the time of writing, it is likely that the VAT will be increased and that the full deductibility of mortgage interest will be restricted.

10. USEFUL REFERENCES

The following sites of Dutch government bodies give a good overview of the Dutch regulations that are relevant for private clients:
Ministry of Finance–*www.government.nl/ministries/fin*
Tax authorities–*www.belastingdienst.nl*
Chamber of Commerce–*www.kvk.nl*
Central Bank–*www.dnb.nl*
Authority for the Financial Markets–*www.afm.nl*