

The Use of Foundations in the Netherlands

1. Introduction

A Dutch foundation (*stichting*) can be used in a number of international structures. These structures can roughly be divided in asset protection and charity structures. After having addressed the main legal and tax characteristics of a Dutch foundation, this article will focus on the main features of Dutch foundation structures.

2. Main legal characteristics of a foundation

On the basis of Dutch corporate law, a foundation is a legal entity. Like other legal entities, for instance NV or BV limited liability companies, a foundation can thus hold title to assets in its own name. It should however be noted that it may not make distributions to its founders or members of the board. A foundation may nevertheless make distributions to charity or distributions that are part of a pension scheme that is administered by the foundation.

Originally, foundations were mainly used for non-profit and charitable purposes. Over the last decades however, foundations are more and more used for commercial purposes as well. Unlike in many other jurisdictions, there is no limitation to the commercial activities that can be performed by a foundation.

A further legal characteristic of a foundation is that it may not, unlike an association, NV or BV, have members or shareholders. It may however issue depositary receipts (*certificaten*) that give beneficial rights to assets that are legally owned by the foundation. A foundation that has issued depositary receipts is generally referred to as a "STAK" (*stichting administratiekantoor*). Through issuing depositary receipts, the voting rights and economic rights to the assets, often shares, are split.

Other relevant legal characteristics include (i) no obligation to contribute equity to the foundation; (ii) the foundation board is the only body that represents the foundation, and (iii) limitation of liability of foundation board members.

A foundation is incorporated through a notarial deed of incorporation. Since there are only few formal requirements, a foundation can be incorporated and be operational within a couple of days. Under Dutch corporate law, it is possible to convert a limited liability company such as an NV or BV into a foundation, and vice versa. Further it is possible to merge or demerge foundations.

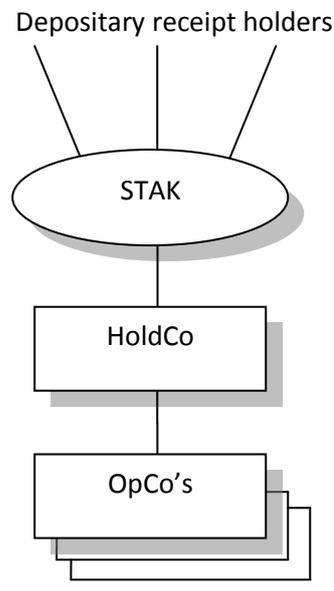
3. Main tax characteristics of a foundation

For Dutch corporate income tax purposes, a foundation is only subject to tax in as far as it is involved in a business enterprise. The performance of activities through which the foundation is competing with other businesses is also considered as a taxable business enterprise. Further, certain pension activities performed by foundations are also considered a taxable business enterprise. Profits from these business activities are subject to 25% Dutch corporate income tax (20% for profits up to EUR 200,000).

It should be noted that if a foundation also performs other activities, such as for instance the holding of portfolio investments, that these other activities are in principle not subject to corporate income tax. In these cases the activities of the foundation will have to be divided into taxable and non taxable activities.

4. Use of foundation for asset protection

In Dutch and international tax structures the foundation is frequently used as an asset protection vehicle. Generally such foundation is set up as a STAK (*stichting administratiekantoor*) holding shares of a holding company. The 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. This structure can be summarized as follows:



The former shareholders of the holding company 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.

From a Dutch tax perspective, the depositary receipts are identified with the shares, if the following main conditions are met:

- For each share that is acquired by the foundation, it will issue one depositary receipt, or an amount of depositary receipts that equals the total nominal value of the contributed share;
- The foundation may only sell the shares, if it transfers the proceeds directly to the depositary receipt holders;
- The foundation may not pledge the shares;
- Dividends received by the foundation should be immediately transferred to the depositary receipt holders;
- If the foundation receives bonus shares or stock dividends, it will issue similar depositary receipts to the depositary receipt holders;
- Liquidation proceeds that are received by the STAK are immediately transferred to the depositary receipt holders in exchange for the receipt of the associated depositary receipts;
- The depositary receipts can only be cancelled through a transfer of the associated shares to the depositary receipt holders.

If these conditions are met, an income tax roll over is available for the transfer of the shares of the holding company to the STAK, in exchange for the depositary receipts. Also, a roll over relief may be available for real estate transfer tax purposes if the shares are considered as shares of a company that predominantly owns Dutch real estate. The above conditions should also be laid down in the articles of association and the conditions of the depositary receipts.

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.

5. Charitable foundation

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;
- The charitable foundation is in principle not subject to Dutch corporate income tax on any income it realizes.

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, the following main conditions need to be met:

- A request is filed with the competent Dutch tax authority;
- The foundation does not strive to generate profits;
- The foundation has a charitable purpose;
- An individual or entity is not be able to dispose of the assets of the foundation as if it were the assets of such individual or entity;
- The amount of assets of the foundation does not exceed the amount that is required for a reasonable fulfillment of its charitable purpose;
- The board members of the foundation do not receive any remuneration other than cost reimbursements;
- Any future liquidation proceeds must also be utilized for charitable purposes;
- Certain administrative conditions, such as a detailed administration and up to date business plan, are met.

Since the above conditions are relatively easy to fulfill, it is cost efficient to establish or register a charitable entity in the Netherlands. As a consequence a number of non Dutch entities have moved to the Netherlands, or have now registered with the Dutch tax authorities.

6. Use of a foundation for other purposes

6.1 General partner

A Dutch foundation is also frequently used to act as a general partner of a limited partnership in order to reduce the liability risk of such general partner. As mentioned above, the liability of the directors of the foundation is normally limited by law.

The profit share that is received by a foundation that acts as a general partner is generally subject to corporate income tax, as it is considered a remuneration that stems from a business activity.

6.2 Securitization SPV

Since a foundation is considered as a separate legal entity, it is also used as Special Purpose Vehicle (SPV) in securitization structures. The foundation SPV will thus hold assets (generally receivables) and will issue securities to the market. Generally such SPV will not be subject to Dutch corporate income tax.

6.3 Estate planning

A charitable foundation is also frequently used in estate planning structures, as it is possible to stipulate in a will that a certain portion of the estate is to be transferred to such a charitable foundation. As mentioned above, this transfer of part of the estate is not subject to Dutch inheritance tax if the deceased was resident, or was deemed to be resident, of the Netherlands. It is also possible to stipulate in the will that the charitable foundation is incorporated at the time of the decease.

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