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Regulation of Corporate Tax Avoidance in the Netherlands

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1. Introduction

This national report will provide an overview of the Dutch framework for dealing with corporate tax avoidance. It is not the intention to go into detail in respect of specific tax avoidance structures. The structure of this report will mainly follow the questionnaire provided by Prof. Brown (Georgetown University), the general reporter on Comparative Regulation of Corporate Tax Avoidance for the 28th International Congress of the IACL.

In paragraph 2 I will briefly address the Dutch legal system, the separation of powers and basic tax procedure (part I of the questionnaire). Paragraph 3 will cover to what extent tax avoidance is specifically addressed in Dutch law (parts II, III, V and XI). Paragraph 4 will deal with how the government deals with tax avoidance, i.e. which institutions are involved with defining and interpreting tax avoidance (part IV). Then in paragraph 5 I will address some requirements on disclosure of tax avoidance schemes for both the tax payer and the consultant (parts VI through IX). Paragraph 6 will then touch upon (the lack of) special anti-tax shelter provisions (part X). Some concluding remarks will follow in paragraph 7.

For the purpose of this report I will follow the definition of tax avoidance as provided for by the general reporter:

> ‘Tax avoidance […] rests between mitigation and attempted evasion. Tax avoidance involves arrangement of a transaction in order to obtain a tax advantage, benefit, or reduction in a manner unintended by the tax law’.

This report will not be dealing with tax evasion, i.e. cases where there is a clear violation of the law as a result of fraud or intentional misstatement of facts.

2. The Dutch Legal System

2.1. Separation of Powers and Legislative Procedure

The Dutch legal system is a civil law system with a traditional separation of powers – judicial, legislative and executive. Members of the House of Representatives (*Tweede Kamer der Staten-Generaal*) can submit a proposal for tax legislation themselves, but the most common source of tax legislations are proposals submitted to parliament by the Government. Such legislation has to be adopted first by the House of Representatives and then by the Senate (*Eerste Kamer der Staten-Generaal*). The House of Representatives has a right to amend proposals made by the government before adopting them.

Many revisions in tax law are done on an annual basis, in particular in respect of the income tax and the corporate tax (for which the taxable year runs from 1 January – 31 December). Most changes are made as of 1 January of each year based on proposals submitted by the end of September (the start of the parliamentary year). The more substantial changes to tax laws, like replacing a corporate tax in full or for a major part, may be done by means of a separate legislative proposal and can be handled in accordance with a suiting time schedule. It should be noted that the excessive speed at which many legislative proposals find their way through the parliamentary process (because of the 3-month period available to adopt most tax legislation), at times gives rise to unanticipated tax avoidance structures and to retroactive or interim changes to tax law in order to deal with those structures accordingly.

It should be pointed out that in accordance with tax laws adopted by parliament the executive (i.e. the under-Secretary of Finance responsible for taxation) may be delegated to set part of second-level tax legislation itself by means of issuing regulations. In turn, the director-general of the Dutch tax authorities can be mandated by the executive to issue certain guidelines and regulations.

2.2. Tax Procedure

Taxes are to be enforced by the Dutch tax authorities (*Belastingdienst*), which is a branch of the Ministry of Finance.

In respect of income taxes, corporate taxes and inheritance taxes, tax payers first submit their assessment of taxes due, upon which the tax authorities will adopt a decision stating the amount of tax due (within 3 years after the end of the fiscal year or the decease). After receipt of that decision, taxes are to be paid. Often an interim-decision is taken (processed automatically) within some months after submitting the assessment which will be in line with that assessment, unless it is found to deviate unexpectedly from previous assessments or from information otherwise available to the tax authorities. This is done to expedite payment without needing to wait for the final decision, thereby limiting additional interest payments. An interim-decision can also be handed down ex officio or on request at the beginning of the fiscal year in order to create a pay-as-you-go system where, based on this initial estimate, taxes are being paid on a monthly basis during the fiscal year.

In respect of wage taxes and value added taxes these are based on a self-assessment, which can be subject to review. Taxes are due upon submission of the self-assessment.

In respect of income taxes and corporate taxes the tax authorities will normally contact the tax payer prior to deciding to divert from the initial assessment submitted. In the absence of an assessment the tax authorities may render a decision on their own authority. Once a formal decision has been taken stating the amount of taxes due, the tax authorities – upon receipt of new information not previously available to them (when taking the first decision) or of proof of bad faith of the taxpayer when he submitted his assessment – may take another decision in order to secure the payment of additional taxes due. Such decision should be taken within 5 years after the end of the fiscal year concerned. As for wage taxes and VAT a decision for additional payment of taxes may be taken within 5 years as well. For these taxes no new information is needed since, as a result of the self-assessment system, the tax authorities had not taken a decision in this case themselves.

If a tax payer disagrees with a formal decision he/she must first go through an administrative review procedure, in which the tax authorities have the opportunity to review their initial assessment. This is normally done by a person not involved in the initial decision. (The tax authorities may give leave for a direct appeal, skipping the administrative review procedure. This happens rarely, often in test cases where court confirmation of a legal interpretation is sought.)

If the initial assessment is upheld, the taxpayer may go to court. First, the tax chamber of one of five regional courts of first instance (*Rechtbank*) is competent to do a full review of both facts as well as the law. If this court upholds the outcome of the administrative review (the initial decision as such is not subject to review, the decision to uphold that decision is) the taxpayer may go to the tax chamber of the regional court of appeals (*Gerechtshof*) which again can do a full review of both facts as well as the law. The tax authorities can also appeal against a decision of the court of first instance finding in favour of the tax payer. Both the tax payer and the tax authorities can go to the tax chamber of the Dutch Supreme Court (*Hoge Raad*) if they disagree with a decision of the court of appeals. This review, however, is limited to legal issues and to procedural shortcomings and not to a further review of facts. In case the final outcome of a case depends on facts not previously settled in the lower courts, the Supreme Court may, after giving its ruling on legal interpretation, refer the case back to the lower courts for further review (these lower courts would be within another region, in order to prevent the same regional court dealing with the same case a second time, after annulment of its previous decision).

As indicated above, tax controversies are normally dealt with by the tax authorities and regular courts, albeit in special tax chambers of those courts. In case of tax fraud or gross negligence it would be possible, upon a joint recommendation of the tax authorities and the public prosecutor to hand cases over to the public prosecutor's office for criminal prosecution (next to the abovementioned process dealing with the settling of the tax due). This happens rather rarely, since the tax authorities are empowered to impose fines themselves. These fines can be very substantial in case of intentional filing of an incorrect assessment, amounting up to a 100% of taxes due in corporate tax cases.

3. The Definition of Tax Avoidance in Dutch Law

3.1. Introduction and Historic Background

The constitution does not provide any particular authority to address tax avoidance, apart from the general possibility to change or adapt laws to it. It is possible to do so retroactively (for those cases not already adjudicated), if the legislator expresses its intent to do so. Neither the Dutch constitution nor Dutch tax law provides for a general definition of terms like 'tax mitigation', 'tax avoidance' and 'tax evasion'. Instead, more specific anti-abuse provisions have been introduced in Dutch tax law addressing tax avoidance. The general framework to deal with tax avoidance structures stems from jurisprudence.

First a general anti-avoidance provision ('rightful levying', in Dutch: *richtige heffing*) has been included in Dutch administrative tax law in 1925, applicable to direct taxes only.[1] It allowed the tax authorities to address situations materially equal to taxable events while not fully covered by the law by eliminating (not substituting) certain legal transactions upon determining the amount of tax due. In order for the tax authorities to apply this provision, it was necessary to get approval from the Ministry of Finance as well as to go through separate

[1] Nowadays Art. 31 ff of the General Tax Act (*Algemene wet inzake rijksbelastingen*).

procedure to establish avoidance. Once established, normal tax procedure would continue. While not formally repealed, the government decided not to use this provision anymore as of mid-1987. The reason for it no longer being used was a development in court which introduced the principle of *fraus legis* in 1926,[2] which was broader in application than the aforementioned legal provision and was administratively less burdensome. This principle had a break-through in 1984 and the Supreme Court confirmed the possibility for its parallel application to *Richtige Heffing* in 1985.[3]

3.2. Fraus legis

Fraus legis can be called upon by the tax authorities. As a result of its application the tax authorities and the courts may either eliminate or substitute a legal action, resulting in the tax burden to be determined based on the legal circumstances as altered by the application of *fraus legis*. I.e. a substance over form approach would be taken in these cases putting the situation created on a par with the legal situation that would normally result in taxes being due as intended by the legislator.

In order to apply the principle of *fraus legis*, the absolutely decisive reason (i.e. the only or by far the most important objective) to go into a legal arrangement should have been to save a substantial amount of (Dutch) taxes. The way the arrangement has been put together must lead to a result that is contrary to the objective and purpose of the law. Moreover, the arrangement as such should have no other practical meaning than to save taxes.[4]

Fraus legis cannot be used if the legislative body foresaw the potential evasion and did not alter the law accordingly or if a legal action is provided to address a particular evasion. In such case no further action can be taken than the action provided, even if insufficient. If the legislative body did not foresee a situation at all (including situations comparable to but not catched by legal actions provided to address a particular evasion structure), *fraus legis* can only be applied if the avoidance is not the result of inherent flaws in the system of the law. If an action was not foreseen and if the resulting reduction in the payment of taxes is unacceptable to society at large, *fraus legis* can thus be applied. Should a substantial business motive be present for creating a particular legal situation next to the mere avoidance of taxes, then *fraus legis* is not to be applied.

In respect of value added taxation, this is an area of taxation mostly regulated by European Law. Since Dutch VAT law provides for an implementation of the European VAT directive, the application of national anti-avoidance principles in respect of this tax is largely governed by the scope of application of their European counterparts. The (restrictive) applicability of the *fraus legis* principle in this area has only been clearly confirmed relatively recently by the 2006 Halifax-judgment of the Court of Justice of the European Communities. In this decision the Court states the following:

> ‘The [VAT] Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the [VAT] Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant

2 Hoge Raad, 26 May 1926, *NJ* 1926, 723.

3 Hoge Raad, 21 November 1984, No. 22 092, *Beslissingen Nederlandse Belastingrechtspraak* 1985/32 and Hoge Raad, 27 February 1985, No. 22 315, *Beslissingen Nederlandse Belastingrechtspraak* 1985/158.

4 See Hoge Raad, 21 November 1984, No. 22 092, loc. cit.

> of which would be *contrary to the purpose* of those provisions. Second, it must also be apparent from a number of objective factors that *the essential aim of the transactions concerned is to obtain a tax advantage*. Where an abusive practice has been found to exist, *the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice'*.[5]

As a result, if a legal arrangement can be explained by a business purpose other than to avoid taxation or to attain tax advantages there seems to be no room to apply anti-avoidance provisions even if tax avoidance would have been one of several objectives of such action.

3.3. Specific Anti-abuse Provisions

Fraus legis is being called upon rather rarely. The government's primary response to tax avoidance structures is to include specific anti-avoidance provisions in the relevant tax laws. As a result, the scope of application of *fraus legis* becomes rather limited because – once anti-avoidance provisions are introduced – any gaps known to the legislator which have been left open are rather unlikely to be filled by the application of *fraus legis* in future.

Some of the anti-avoidance provisions introduced in Dutch corporate tax law are listed below:

- some intra-group interest deductions can be non-deductible, unless either a business objective has been proven (i.e. a transaction not aimed at avoiding taxes) or the presence of a sufficient compensatory levy at the recipient (the recipient being subject to tax on the interest received, with a minimum tax levied comparable to a 10% tax on a tax base similar to the Dutch one);
- deferral of tax in case of a merger or split-up will not be granted if the primary objective of such action is to avoid or postpone the payment of taxes. It is for the taxpayer to establish credibly that such merger or split-up serves a genuine business purpose (like corporate restructuring); if shares in entities involved in a merger or split-up are sold outside of the company's group within 3 years there is a legal assumption that such genuine purpose is absent;
- special rules have been introduced to address tax arbitrage between natural persons/shareholders and the incorporated companies they hold;
- intra-group transactions that are not at arm's length and intra-group loans at extraordinary conditions may be revised or requalified;
- a thin-capitalization provision has been introduced in order to limit the deductibility of interest;
- the deduction of losses is limited in case of a company take-over, in particular in case previous losses remain while the actual business of a corporation is closing down, in order to prevent such losses to be used for new business purposes (which is allowed in the absence of a take-over of legal entities);
- the general participation exemption (applying to shareholdings as of 5%) is replaced by a system of foreign tax deductions, in case the participation held concerns a low-taxed corporation involved in (non-business related) portfolio investment.

[5] ECJ C-255/02 of 21 February 2006, *European Court Records* 2006, I-1609; italics added. As a result of the entry into force of the Lisbon Treaty on 1 December 2009, the Court of Justice of the European Communities has now become the Court of Justice, which is part of the Court of Justice of the European Union.

In June 2009 there has been a white paper for changes to corporate taxation, in particular addressing issues of thin capitalization by private equity companies as well as a more general limitation on interest deduction (replacing the large number of single anti-avoidance provisions currently in place). Further action in this respect has been postponed until further notice.

4. Establishing Tax Avoidance

4.1. Burden of Proof and Standard of Review

As addressed in paragraph 3.2, the Netherlands does apply a general anti-avoidance rule by means of the *fraus legis* principle developed by the courts, although it de facto abandoned the general anti-avoidance provision provided by law. The scope of application of *fraus legis* is rather limited, however, because of the policy focus to include specific anti-avoidance provisions in tax laws. Should the tax authorities call upon *fraus legis* when deciding upon the tax burden or in court, they have the initial burden of proof to show that this anti-avoidance rule applies.

In respect of the application of specific anti-avoidance provisions, the burden of proof is split between the tax payer and the tax authorities depending on what is claimed. In respect of establishing the presence of income there is a burden of proof on the authorities. On the other hand, in respect of claiming interest deduction, participation exemption, etc. the burden of proof is on the tax payer. Special provisions may divide the burden of proof differently (see hereafter) or qualify the burden of proof that has to be met (varying from 'making credible', as a result of which the other party has to show differently, to actually proving that certain conditions have been met).

Corporations and individuals carrying out a business are under an obligation to keep books and a reliable administration. If they are found not to have kept their books in good order (or not to have kept books at all) the burden of proof may shift to the taxpayer as a result of a reversed-onus clause in the general administrative tax law, allowing the tax authorities to make reasonable assumptions about the tax burden requiring evidence of the contrary from the tax payer.

Sometimes the law itself provides for rather sophisticated provisions on burden of proof. For instance, certain intra-group financing arrangements are deemed to result in non-deductible interest. In order to get around some of these limitations it is possible for the tax payer to make credible that (i) the loan transaction served a business purpose or (ii) the recipient of the interest is subject to a reasonable level of tax. The law provides that a 10% tax (with reference to a tax base comparable to the Dutch tax base) would suffice. While the initial burden of proof is thus on the taxpayer, once (ii) is proven the tax authorities may still make credible that – even in case of reasonable taxation – the transaction did not serve a business purpose. If a party has to make his position credible (a lighter burden of proof), it is up to the other party to provide evidence of the contrary (a heavier burden of proof).

Tax authorities will normally allow a court decision in respect of a previous year to serve as a precedent for upcoming years in respect of the same element of the tax assessment, as long as neither the facts nor the law does change. As far as their own actions are concerned, an explicit communication about a decision made in respect of previous transactions – other than the mere acceptance of a (self-) assessment at face value – may give rise to legitimate expectations in respect of future years if the situation remains unchanged (in fact or in law), unless the tax authorities indicate their intent to change their initial assessment for future years in time. The latter may call for an interim/phase-out period. In respect of the application of *fraus legis*, it should be pointed out that the tax authorities must bring it up in its decisions per separate year, although it is most likely that a court decision in respect of a previous year will be sustained for subsequent years under the same circumstances (if the tax payer would go to court a second time around).

4.2. Applying fraus legis in Respect of International Transactions

The Dutch Supreme Court has not ruled out that the principle of *fraus legis* can be applied in cases where the application of double tax conventions is concerned (in which respect *fraus legis* is commonly referred to as *fraus tractatus* or *fraus conventionis*). Even so, the Court has allowed itself very little room to apply this principle in case of tax treaty interpretation. It seems possible to apply this principle in a legal setting that provides a result contrary to the objective and purpose of double tax convention (DTC) provisions as intended by the parties involved.[6] Unlike the legislative process often little is known about the preparatory phases of a DTC as a result of which in the absence of an explicit statement of intentions in the DTC or annexes thereto there seems little room for applying the *fraus legis* concept in respect of the application of DTC's to date. For this reason, the application of *fraus legis* in the context of a DTC has hereto been unsuccessful.[7] The Supreme Court made clear, however, that saving taxes by means of moving residency to the other contracting state, thereby shifting the power to tax to the other state thus resulting in the avoidance of Dutch taxes, normally falls within the objective and purpose of a DTC.[8]

In respect of cross-border transactions, it should be pointed out that a number of special anti-avoidance provisions listed in paragraph 3.3 explicitly apply in cross-border situations, i.e. where the tax burden on interest receipt abroad or on profits made abroad is rather low or non-existent.

In order to overcome certain tax avoidances routes making use of DTC's, subject-to-tax clauses have been introduced in respect of pensions in some tax treaties. Sometimes, special tax regimes may be excluded from a treaty in order to prevent that treaty benefits are granted to (nearly) exempt undertakings in the other contracting state. Moreover, some treaties contain special anti-avoidance provisions. For instance, the NL-UK tax treaty provisions on dividends, interest and royalties explicitly provide that exemption of withholding tax will not be granted if the respective share, loan or license has mainly been created in order to be able to benefit from these provisions in the absence of any bona fide business purpose. Furthermore, in conformity with the OECD Model Tax Treaties, beneficial ownership clauses have been included in most DTC-provisions on dividends.

Last but not least, it should be mentioned that limitation-on-benefits (LOB) provisions are rather rare in DTC's signed by the Netherlands, also due to restrictions imposed by European Law (in particular in respect of LOB-provisions attached to nationality rather than residency). The NL-US DTC is the only one with a relatively long-standing tradition of containing over-all LOB-provisions.

[6] See in particular Hoge Raad, 15 December 1993, No. 29 296, *Beslissingen Nederlandse Belastingrechtspraak* 1994/259 and Hoge Raad, 14 July 2006, No. 42 522, *Beslissingen Nederlandse Belastingrechtspraak* 2007/42.

[7] Except for the application of this principle on a sort-of-DTC with the Dutch Antilles. Since the Antilles are part of the Kingdom of the Netherlands, the nature of this agreement is different from that of normal DTCs and will therefore not be discussed here.

[8] Hoge Raad, 12 May 2006, No. 39 223, *Beslissingen Nederlandse Belastingrechtspraak* 2007/36; Hoge Raad, 14 July 2006, No. 42 522, loc. cit.

4.3. Penalties

Penalties can only be imposed if a taxpayer's position was not 'pleadable' in court, to say that he took a position so clearly contrary to the law that his position could not reasonably be considered an acceptable plea, essentially resulting in gross negligence or even intent to fraud. Given the complexity of a *fraus legis* analysis, a finding of *fraus legis*/tax avoidance would therefore not necessarily be sufficient ground for imposing tax penalties. To the contrary, most tax avoidance transactions are by their very nature often in accordance with the letter of the law (albeit not with the spirit and objective of the law as such) and therefore seldom qualify as a punishable offence.

Should fines be imposed by the tax authorities they would by their very nature be monetary. In the rather unlikely case of criminal prosecution of tax avoidance structures, where gross negligence could be proven, criminal penalties may either be of a monetary nature or – to the extent the actual managers of a corporation would be charged themselves next to their company – consist of a prison sentence. Again, this would be extraordinary and not common practice.

5. Disclosure of Tax Avoidance Practice

No specific disclosure provisions apply to either the tax payer or his tax consultant involved in anti-avoidance schemes. Neither is there an obligation to register any anti-avoidance schemes designed by tax consultants. However, corporate taxpayers have a general obligation to provide information relevant for the tax authorities on request. To the extent tax consultant communications reflect the determination of a tax payer's legal position, even in respect of tax avoidance structures, such communication would normally be privileged.

Tax consultants are under an obligation to report cases of money laundering or the financing of terrorism.[9] In order to do so they need to do an initial assessment of new clients. In case of potential involvement in illegal activities, a more in-depth analysis would be required, according to the Code of Conduct of one of the largest Dutch associations of tax consultants (*Nederlandse Orde van Belastingadviseurs*). As indicators of illegality this code mentions the use of intermediary corporations for which there seems not to be a 'legitimate' tax, legal or commercial reason as well as the use of foreign corporations that are located in a country known for its mild tax climate (and/or strict bank secrecy) for which their neither seems to be a legitimate reason. While both the use of intermediaries as well as the use of foreign corporations may be elements of certain tax avoidance (and/or evasion) structures, these indicators for an in-depth investigation are not meant to necessarily result in an obligation to report transactions aimed at tax avoidance, in the absence of any underlying illegal activity. I.e. the tax avoidance structure as such is not considered illegal for the purpose of this analysis.

[9] While the Netherlands are said to have the highest number of tax consultants per capita in the world, it should be pointed out that being a tax consultant is not a government-regulated profession in the Netherlands. Most importantly, while many tax consultants may be lawyers most of them are not 'advocates' in court, partly because of the facts that in tax procedure there is no need to be represented by an 'advocate' in court. The tax payer may essentially hire anyone he prefers or represent himself. Most larger firms employ or hire in tax consultants next to their accountant and their corporate lawyer. Accountants normally refrain from handling tax affairs for the most part, except for small and medium sized enterprises.

It is interesting to see that the two largest associations of tax consultants in the Netherlands provide in their code of conduct provisions that indeed may cover their involvement in tax avoidance structures, while in practice such structuring is deemed acceptable practice to the extent there would be a 'pleadable position'. One association (*Nederlandse Federatie van Belasting-adviseurs*) provides that its members shall not take part in legal constructions that violate law and jurisprudence, albeit that taking a 'pleadeable' position would be acceptable. Another association (*Nederlandse Orde van Belasting-adviseurs*) introduced a special code of conduct stating that its members play their part in ensuring that tax laws are implemented in accordance with their nature and objective. The latter suggests that any involvement in tax avoidance schemes covered by *fraus legis* – as a result of which the objective of a law is deemed not to have been complied with – would already result in a violation of the code of conduct. It is unclear whether this was actually intended.

Larger taxpaying companies may apply for an alternative system of review by tax authorities called horizontal supervision (*horizontaal toezicht*). If the tax authorities are satisfied with the (certified) tax control framework in place and with the companies' current and previous cooperation, they may be eligible for this less stringent system of review. As part of this review system, companies are expected to notify tax authorities of substantial changes in their tax position in advanced and to consult them in order to determine their tax position upon engaging in certain tax structures. Failure to inform the tax authorities in advance as well as cases of extreme tax avoidance may affect their eligibility; the tax authorities would probably respond by withdrawing from this horizontal supervision agreement and return to standard (if not more stringent) supervision methods (mostly ex-post).

As of 1 July 2009, administrative fines can be imposed by the tax authorities on tax consultants who assist their clients in actions for which the latter may be fined themselves as well (from small penalties for late payment or the late or non-filing of assessments to more severe penalties for filing incorrect assessment with the intent to pay insufficient taxes or in case of gross negligence). The government has committed itself to limit the fining of tax consultants to the more extreme and clear cut cases, requiring the tax inspector to be authorized by senior management. As a result, active involvement in tax avoidance structures is unlikely to trigger such authorization, because – as stated in paragraph 4.3 – many tax avoidance structures are often 'pleadable' in court and would not have led to non-payment or insufficient payment of taxes in the absence of the application of *fraus legis*. (In accordance with criminal law, the tax consultant himself could already be tried as a co-conspirator if criminal charges were filed even prior to 2009, which, as stated in paragraph 4.3, would be very unlikely in respect of tax avoidance structures.)

6. Tax Shelters

No special penalty provisions apply to making use of tax shelters, although the use of such shelters may result in the application of specific anti-avoidance rules. For instance, (i) a tax shelter abroad resulting in low-tax portfolio investment by subsidiaries may forfeit the full application of the participation exemption or (ii) no relieve may be granted from an interest deduction limitation in the absence of a reasonable level of taxation at the recipient's side (see paragraph 3.3).

Two of the most famous corporate tax shelters in the Netherlands will be mentioned here. First, the participation exemption is available which is a longstanding, integral part of the Dutch tax system.[10] The latter essentially excludes any dividend income or capital gain from shares held in other companies. I.e. it operates under the presumption that business income will be taxed at the subsidiary operating the business (either in the Netherlands or abroad) and prevents double taxation of such profits at holding level.

Secondly, the absence of withholding taxes on interest and royalties paid from the Netherlands should be mentioned. Together with an elaborate tax treaty framework providing mostly for a rather low to nil withholding tax on royalty payments flowing into the Netherlands, the use of Dutch conduit companies may result in a flow-through of royalties at a relatively low tax rate (i.e. the normal tax due on the on balance royalty income based on an at arm's length spread.) With the introduction of the EU's Interest & Royalty Directive in 2004 this tax shelter has become less attractive in intra-EU situations, because of the EU-wide obligation to reduce such withholding taxes if the beneficial owner resides within the EU.

7. Concluding Remarks

The Netherlands has a long-standing tradition of providing tools to address tax avoidance. While a legal basis to do so was introduced in 1925 it effectively has been replaced since by the *fraus legis* principle developed in jurisprudence since 1926, which allows both for a broader application as well as for the substitution of legal transactions (next to elimination thereof) in order to overcome tax avoidance structures that go contrary to the purpose and objective of tax law provisions. There is little room to apply the *fraus legis* principle as a general anti-avoidance rule in practice in those cases where the legislator foresaw constructions and failed to act at all or to act efficiently. In the last decennium corporate tax law has been extended by a large number of specific tax avoidance provisions regulating particular avoidance structures. Only recently a government white paper indicated a tendency to consider replacement of these specific provisions by broader anti-avoidance rules in order to reduce the complexity of the tax system albeit at the cost of overkill. A follow-up to this paper has been postponed for the time being.[11]

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[10] Art. 13 ff., Corporate Income Tax Act of 1969 (*Wet op de vennootschapsbelasting 1969*).
[11] This report has been finalized in January 2010.