DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Documentation for the visit to The Netherlands of the TAXE Committee

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1. BRIEF OVERVIEW OF THE CORPORATE INCOME TAX

- The **corporate income tax** is a **national tax** that applies to the entire territory of the Netherlands, except its oversees municipalities in the Caribbean.

- The general corporate income tax rate is 25%, with a starting rate of 20% for the first € 200.000 of taxable profit.

- As of 2012 The Netherlands effectively apply a territorial tax regime, excluding foreign business profits from the tax base (with the exception of income from portfolio investments).

- Notable **special regimes** are:

  - the **innovation box**, leading to an effective tax rate of 5% on income from patents or other certified R&D activities, excluding brand and trademark rights. Income will only qualify once tax-deductible R&D costs have been made up for;

  - the **tonnage tax** regime;

  - an optional exemption system for certain **investment funds** ('Vrijgestelde beleggingsinstellingen') and a 0% rate for certain investment funds that distribute their profits to investors ('Fiscale beleggingsinstellingen').

- Other notable provisions in the Dutch tax code are:

  - the participation exemption ('Deelnemingsvrijstelling'), exempting benefits from holding ≥5% of shares in (foreign and domestic) subsidiaries, such as dividends received and capital gains upon sale;

  - the fiscal unity regime ('Fiscale Eenheid), allowing for the taxation of groups at a consolidated level.

- The Netherlands have a **dividend withholding tax**, which can be credited against Dutch corporate (or personal) income tax where applicable. No withholding tax will be imposed in case the participation exemption is applicable or when a fiscal unity has been established.

- There is **no withholding tax on interest payments or royalties**.

2. APA/ATR GOVERNANCE

- In order to ensure coordination and the building of expertise on transfer pricing, a **coordination group on transfer pricing** ("CGVP") was established within the tax authorities in **1998**. Members of this group are active both at management level as well as within the different offices of the tax authorities.

- Next to this CGVP, there is a **special team** at Rotterdam that **handles advanced tax rulings (ATRs) and unilateral/bilateral advance pricing agreements (APAs)** as of **2004**. This team may be consulted by local tax authorities and it may give binding opinions to them in certain situations. Obligatory consultation must take place, inter alia, in respect of request for:

  - confirmation of the participation exemption for situations where none of the subsidiaries of a holding carries out business activities in the Netherlands;

  - confirmation of international structures that involve hybrid financing or hybrid legal entities;

  - confirmation of the absence or presence of a permanent establishment in the Netherlands in respect of tax liability.

- Certain situations, such as group financing companies and IP-management entities with limited to no real economic presence in the Netherlands, will be dealt with by the Rotterdam office exclusively as to ensure enhanced scrutiny for these situations, as will entities with mere holding, financing and licensing functions within international groups.

- At Rotterdam there is also a **contact point for potential foreign investors** ("APBI"), which mainly takes care of investors that are willing to make physical investments in the Netherlands of at least 4.5 Million Euro and whose central management is outside of the Netherlands. This is done to ensure that potential investors also have a way to get in touch with the Dutch tax authorities even before they are formally considered to be taxpayers in the Netherlands. If such investor already has substantial activities in the Netherlands he will be dealt with by local authorities. Local authorities may refer additional major investments by those investors to the APBI for consultation.

- Corporations, mainly larger ones, may opt for a system of horizontal supervision ("Horizontaal toezicht"). It allows them to get early-access to tax authorities. Corporations oblige themselves to inform the authorities pro-actively of potential tax issues and to discuss them openly in advance as much as possible. The tax authorities will screen the internal control systems of these companies, in order to optimize tax compliance.

3. APA/ATR POLICY

- **On average 420 ATRs and 226 APAs have been issued annually** (2010-2014). The average annual number of requests for ATRs/APAs denied, withdrawn or set aside amounted to 175.

- **Main guidance on APA/ATR policy was published in 2004**, with some minor revisions in 2014. The most substantial revision in 2014 concerned additional scrutiny in respect of determining substance (see Annex). A model overview of the most common ATRs has been published in 2014 (no translation available).

- An **APA/ATR** will normally be **valid for a period of 4 to 5 years**, with possible exceptions in case they cover long term contracts or in case of bilateral agreements. After a review a new, consecutive APA/ATR may be issued. A substantial change in relevant circumstances or facts may lead to the termination of an APA/ATR.

- Applicants for an APA need to hand over descriptions of transactions and products/agreements involved, next to a proposal for a suggested transfer pricing method including a comparability analysis, providing third party prices and clarifications of corrections made, as well as an indication of market conditions (trends, competition, etc.). In principle, the taxpayer may choose and substantiate any calculation method, provided that it leads to an at arm's length price for the transaction at hand. As it may be difficult for small-sized enterprises to provide such reliable market details, the tax authorities may offer them assistance in gathering information when applying for an APA.

- As of 2014 **no APA will be issued to group financial service entities that have insufficient presence** (substance) in the Netherlands and to those whose activities in the Netherlands carry little to no real risks (credit risks, market risks or operational risks). As of mid-2014 **an APA** that has been granted to service entities **will be exchanged spontaneously with other countries** if the group of which the entity is part is lacking substance in the Netherlands and has no real plans to extend its presence.

- In respect of holding companies **ATRs will only be available to those with sufficient physical presence (substance)** in the Netherlands and to those that are part of a group that is performing or planning to perform operational activities in the Netherlands as of mid-2014. (See Annex.)

- In 1995 and 2004 the State Secretary for Finance decreed that **no rulings were to be issues in cases that would lead to abuse of law** ("fraus legis"). If a structure would be set up that would clearly lead to abuse of law at the side of a tax treaty partner, the taxpayer must first show that the tax authorities in the other country are fully informed of the transaction or tax structure.

4. Taxable profit and the 'at arms length principle'

- In the Netherlands the determination of taxable profit is separated from the determination of commercial profit. Taxable profit is mainly determined on the basis of the principle of good bookkeeping by a diligent merchant ("Good koopmansgebruik") from the 1950s.

- Based on both this principle and subsequent case law companies that are related (such as group companies) must act as unrelated parties for the determination of taxable profit. Because of this, the **taxable profit of an entity may be adjusted either upwards or downwards if deemed necessary to reflect a proper allocation of profit** to Dutch taxable entities.

- This principle has been confirmed explicitly in Dutch tax law **as of 2002** by the introduction of an at arm's length provision in the corporate income tax ('Article 8b of the Vennootschapsbelasting 1969'). Based on this provision, **taxpayers** operating within a group **are obliged to permanently have transfer pricing documentation available in their files on any transactions with associated enterprises**.

- In November 2013 the State Secretary of Finance decreed that the OECD transfer pricing guidelines may serve to clarify the application of article 8B. Such a decree is binding on the tax authorities, but it would not be binding the courts or the taxpayer necessarily.

5. Settlement agreements

- A taxpayer and the tax authorities may settle genuine legal disputes in a **settlement agreement** ('Fiscaal compromis') within reason. Such agreement will be invalid if, when the agreement is signed, parties must have known that it is clearly contrary to the text or purpose of the law. Thus, such agreements can go contrary to the law and still be binding, unless it was evident that the settlement would violate the law to such a degree that parties could not expect that it would be lived up to.

6. State aid investigations

- There is a pending state aid investigation into the rather broad corporate income tax exemption for government-owned enterprises. The Dutch tax code is likely to be changed to address these issues by 2016.

- There is a pending state aid investigation into a tax ruling issued to Starbucks. In its press release (IP/14/663) the Commission stated:

  "Regarding tax rulings specifically, the preliminary enquiries have shown that the quality and the consistency of the scrutiny by the tax authorities differ substantively across Member States. In particular, the Commission notes that **The Netherlands** seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer. The Commission therefore does not expect to encounter systematic irregularities in tax rulings. However, at this stage the Commission has concerns that the tax ruling for Starbucks Manufacturing EMEA BV is providing that company with a selective advantage, because there are doubts whether it is in line with a market-based assessment of transfer pricing."

Annex

N. Vis, "Introduction of Substance Requirements for Netherlands Holding Companies", European Taxation, December 2014, pp. 583-586, provides an unofficial translation of the revised and extended 2014 substance requirements:

Table: Comparison of substance requirements from both a tax and civil law perspective	
Decree of 12 June 2014	**Civil law**
At least 50% of the members of the statutory board of directors with decision making powers should live or actually reside in the Netherlands.	Netherlands civil law has no specific requirements in terms of composition of the board of directors and/or nationality/ residency of the board members.
The board members residing in the Netherlands should be sufficiently competent and qualified to perform their tasks. Their tasks should at least concern (1) decision-making on the transactions the company will perform, and (2) the proper completion of the transactions the company will perform.	Netherlands civil law requires that every board member perform its tasks adequately and that he/she maintain a reliable administration. Based on this, case law has determined that board members should have the necessary capabilities.
The entity should have qualified staff at its disposal in order to adequately process and register the transactions the entity will perform.	Employing qualified and competent staff is (also) a responsibility of the company's board of directors (as the employer).
The board decisions should be taken in the Netherlands.	Civil law does not contain any requirements in terms of the manner and location in which decisions are made.
The most important bank accounts of the entity should be maintained in the Netherlands.	There is no such condition.
The bookkeeping should be maintained in the Netherlands.	It is not a legal obligation to maintain the bookkeeping in the Netherlands, provided that the board of directors is able to provide the necessary overview of the rights and obligations of the legal entity.
The entity should – at least at the moment of decision – have met all its tax compliance obligations in a correct manner. This could concern Netherlands corporate income tax, wage taxes, VAT, etc.	This is a responsibility of the board of directors. Not meeting this obligation could result in an irrefutable presumption of mismanagement and potential liability in the event of bankruptcy.
The entity should have a registered address in the Netherlands. The entity will, as far as can be known, not (also) be treated as a tax resident of any other country.	The registered address is not required to be in the Netherlands (contrary to the statutory seat of a company, which should be established in the Netherlands).
In respect of requests related to a transaction involving a participation, there is a requirement that the requestor must have financed or will finance the cost price of the partici-pations for which an ATR is being requested with at least 15% equity.	This condition has no relevance from a civil law perspective.