

## **Comments by the Netherlands on the Recommendations on Tax Haven Jurisdictions HB2460 from the Oregon Department of Revenue, January 1, 2015**

### **The Netherlands**

Located on the crossroads between several big European countries, historically the Netherlands is a logical place to establish regional headquarters, logistics centers etc. Traditionally, the Netherlands has been a hub for international trade and investment as a result of a high quality infrastructure and education. The port of Rotterdam is the largest port in the Western hemisphere; Schiphol Amsterdam airport (with direct flights to Portland, OR) is one of Europe's four major airports, and serves as a hub of businesses and activities that all reinforce each other. With the development of new information technology, it has become easier for companies to operate internationally, and to centralize certain managerial functions in regional headquarters. Having an open economy, it is important for the Netherlands to have a solid and efficient legal system. Combined with the relatively stable political, social and economic climate, the Netherlands has attracted businesses of all kinds from all over the world, including regional headquarter companies of non-European multinational enterprises.

The Recommendations indicate that the profits reported by U.S. corporations in the Netherlands equal nearly one-quarter of Dutch GDP. Furthermore, the Recommendations indicate that U.S. corporations reported \$168,279 billion in profits in the Netherlands during 2012. This demonstrates that there is a strong bilateral economic relationship between the Netherlands and the U.S. The high trade volumes and the strong investment relations between the U.S. and the Netherlands go back over 400 years and derive from real economic activity. The Netherlands is the third biggest foreign investor in the U.S. and Dutch investment in the U.S. accounts for 685,000 jobs. The Netherlands is after the US the second largest agricultural exporter in the world. The Netherlands is the historic home of Shell, Unilever, Philips, Akzo, Heineken.

### **The Netherlands tax system**

#### *General*

In the Netherlands, it is not possible to shift profits from a foreign company to a Dutch company. In this respect, a company in the Netherlands can only apply the innovation box if this company has real self-developed R&D activities in the Netherlands. This means that without substance in the Netherlands, you cannot allocate profit to the Netherlands.

The Netherlands has welcomed and actively supports the initiatives the G20, OECD and EU have taken to combat tax avoidance and evasion. The Netherlands is also in the vanguard in the area of tax transparency and to improve the automatic exchange of information.

#### *Rates*

The Netherlands has a corporate income tax rate of 25%, and a lower rate of 20% is limited to the first €200,000 profit. All companies incorporated in the Netherlands are subject to tax on their worldwide income and an effective tax rate at a comparable international level.

#### *Participation exemption*

In the Recommendations, reference is made to Dutch companies using a nominal corporate tax rate without a substantive connection to the Netherlands.

We assume you are referring to Dutch companies using the "participation exemption," which is an exemption on certain dividends received by a parent company (the participant) from a subsidiary. The objective of the exemption is to avoid double taxation when the profits of a subsidiary (both domestic and foreign) are distributed to its parent company, specifically double taxation of dividends. By exempting dividends originating from foreign subsidiaries or permanent establishments, the profits are effectively only taxed where the activities take place, and where the profits are derived. In this way, the company has a level playing field with the companies in the country where the business activities are taking place. The participation exemption is aimed to avoid double taxation, and is certainly not aimed at providing a double non-taxation. Anti-abuse regulations are in place to make sure that subsidiaries which are held as an investment, or

subsidiaries that function as financing companies and are not sufficiently taxed in their resident countries, will not qualify for the participation exemption. You are referring to the participation exemption as a tax incentive and a structure favourable to tax avoidance and therefore an argument to put the Netherlands on the list. We are convinced that the participation exemption is a solid instrument to avoid double taxation. Meanwhile, there are many more countries that have a (similar form of a) participation exemption, among others the UK and Japan, and it is a well known concept. It is certainly not a factor that provides an argument to put the Netherlands on the list.

The Netherlands is actively seeking to address treaty abuse in all of its bilateral tax treaties through specific anti-abuse provisions. In the Recommendations, reference is made to the international "sandwiches" (p. 34), as an example of the role the Netherlands played in tax avoidance schemes and to indicate that the Netherlands has created a tax regime favourable to tax avoidance. This is incorrect.

The Netherlands - through specific anti-abuse provisions - is actively seeking to address treaty abuse in all of its bilateral tax treaties (see under the Netherlands and international developments). Furthermore, in the specific case of Ireland, we have initiated a renegotiation of the 1969 tax treaty between the Netherlands and Ireland. The Netherlands has proposed anti-abuse provisions with a view to combat tax planning structures like the international "sandwiches". We expect the new treaty to be signed in the near future.

#### *Innovation box*

The Recommendations refer in part to a tax rate of 5%, which we assume refers to an economic development incentive known as the "innovation box." The Netherlands has introduced the innovation box to stimulate R&D and innovative activities in the Netherlands. The innovation box aims to promote the positive economic activity (spill-overs) that results from research and development. To prevent tax avoidance schemes and profit shifting the regime can only be applied if a company has real R&D activities in the Netherlands. The regime can be applied on self-developed innovative (e.g. patent or plant variety rights) intangible assets. An asset can only be considered self-developed if the company has sufficient subject-matter expertise in the Netherlands and is functionally capable to control the research and development work in the Netherlands. The innovation box is applied on the net income that can be attributed to qualifying intangible assets. The income is determined based on methods derived from the "at-arm's-length principle". The income derived from this part of the profits is subject to an effective tax rate of 5% (instead of 25%). However because the full income of a company can never be attributed to qualifying assets the effective tax rate of a company will in any case be (well) above this 5%. The rules and conditions to apply this rate are strict and laid down in legislation and a decree. Finally, there are many more countries around the world, applying a similar method of taxation.

#### **Hybrid financing arrangements – Dutch Supreme Court Decision**

The Recommendations refer to an example on the hybrid financing arrangements, and a Dutch Supreme Court decision.

This case shows that the Dutch authorities are active in countering tax avoidance. That the Dutch tax authorities did not prevail only underlies the need for coordinated solutions. This example makes perfectly clear that solutions should be achieved by international cooperation. In the case at hand, an Australian company had issued redeemable shares which, under Australian law are treated as equity, whilst, as the Dutch Supreme Court ruled, under Netherlands tax law, such shares are to be treated as debt.

Issues like these arise because of the fact that taxpayers make use of the lack of coherence between individual countries' law and tax systems. The lack of coherence between systems is a global problem. All countries in the world face the same issue. It is not at all caused because of any Netherlands favorable tax measure, and can only be solved in an international context. The issue in general –hybrid mismatches- is specifically addressed in one of the action items of the OECD's Base Erosion and Profit-Shifting (BEPS) project. The Netherlands is actively involved in the working group on hybrid mismatches, and is actively contributing to find a solution to the various worldwide hybrid mismatches situations. Results will be presented in the coming months.

We are strongly convinced that this case is not an example of the Netherlands creating a tax regime favorable to tax avoidance, and therefore cannot be considered a valid argument to include the Netherlands on the list of "tax haven" jurisdictions.

### **The Netherlands and international developments**

The Netherlands has welcomed and actively supports the initiatives the G20, OECD and EU have taken to combat tax avoidance and evasion.

These initiatives include, as important spearheads, proposals to improve transparency and automatic exchange of information and to modernize bilateral tax treaties. International agreements are required, as unilateral measures do not provide a structural solution to the problem and are accompanied by the risk of unnecessary disruptions of the investment climate. The Netherlands Government emphasizes that international tax evasion and avoidance can only be countered effectively through international cooperation.

That is why the Netherlands has taken intensive part in the Base Erosion Profit Shifting project from the OECD. Although the Netherlands believes international cooperation is key to successfully combat tax evasion, the Netherlands has also taken some steps unilaterally.

### **The role of "link" companies in the Netherlands**

The Netherlands is the European home for more than 2,100 U.S. companies, and the list grows. The Netherlands has an attractive and competitive investment and business climate.

In the Netherlands, it is relatively easy to incorporate a company. That is not different from many other countries. One of the main features of the Netherlands is that it has an open economy, and an attractive business climate. The great majority of these companies are engaged in real business activities.

In a number of cases the question may arise whether certain companies established in the Netherlands as affiliates of company groups in other countries ("link" companies or "special financial institutions") make use of the Dutch treaty network in keeping with the spirit of Dutch legislation and with the intentions of the contracting states. The government therefore does not close its eyes to criticism of the role played by Dutch link companies in international group structures or to the conspicuous volume of the monetary flows that pass through Dutch special financial institutions. For that reason, the government has announced that despite its clear preference for a coordinated international approach, the Netherlands government is of the opinion that the Netherlands has its own responsibility in preventing unintended use of treaties in combination with Dutch legislation.

The Netherlands has adopted unilateral measures at countering aggressive tax planning, one of those measures being spontaneous exchange of information with treaty partners regarding legal entities incorporated in the Netherlands which lack economic substance that are engaged in financial transactions. The government's letter to the Dutch Parliament dated August 30, 2013 has been enclosed to this letter. See pages 25-27. In 2014, all unilateral measures described in the letter came into force.

In these areas action is also being undertaken within the European Union. Most notably, in December 2014 the Council of the European Union agreed to introduce a binding anti-abuse clause against corporate tax avoidance in the EU parent-subsidiary directive. Reference is being made to the press release:

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/146127.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/146127.pdf)

It is expected that in the near future the EU interest and royalties directive will be the subject of similar discussions as to how further measures could be undertaken with a view to combating tax avoidance.