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Private Wealth 2022

Netherlands: Law & Practice

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1. TAX

1.1 Tax Regimes

Domicile and Residency

In the Netherlands, resident individuals are taxed on their worldwide income and wealth. Non-residents are only taxed on certain types of income and wealth with a nexus to the Netherlands (see *Non-residents*, below). Domicile is, in principle, not relevant for Dutch tax purposes.

According to Dutch case law, a person is considered a resident for tax purposes if, based on all the relevant facts and circumstances, a "durable bond of a personal nature" exists with the Netherlands. This is determined on, inter alia, the availability of a primary residence, where the person has a place of habitual abode and where the family is located. Intentions or the number of days spent in or outside the Netherlands are of lesser relevance.

A person may have durable bonds with different countries, whereby the strongest durable bond is not necessarily decisive for tax residency. In such a case, a tax treaty may provide for a tie-breaker to determine a person's tax residence. Note that the Netherlands has concluded only a very limited number of treaties regarding gift and/or inheritance tax.

Personal Income Tax in the Netherlands

In the Netherlands, personal income tax is levied pursuant to the Personal Income Tax Act 2001. The taxable income (either worldwide income and wealth for resident taxpayers or specific income and wealth with a Dutch nexus for non-resident taxpayers) is allocated to three different "boxes", according to source:

- box 1: income from labour, business and principal residence – rates vary from 37.07% to 49.5% (2022);
- box 2: income from substantial interest – flat rate of 26.9% (2022); and
- box 3: deemed income from savings and investments – flat rate of 31% on deemed income (effective tax rates in 2022 vary from 0.56% to 1.71%) (please note that the Dutch Supreme Court has ruled this system to be in violation of the European Convention on Human Rights, so a new box 3 income tax system is being introduced – see *Box 3*, below).

In general, income and deductible amounts derived from and relating to a certain source can only be offset in the same box. However, certain personal allowances (eg, alimony, childcare expenses and medical expenses) are deductible in box 1, box 3 and box 2 (in this order) if the income from the preceding box is not sufficient for a deduction in full.

Partners are, in principle, taxed individually. This is only different for certain categories of joint income, deductible expenses and wealth, which can be apportioned freely between partners. For Dutch personal income tax purposes, "partners" refers to the following:

- married people and people that have entered into a registered partnership recorded with the municipality (automatically); and
- people living together without being married (subject to certain conditions).

As well as personal income tax, a person resident in the Netherlands will generally also be subject to the Dutch compulsory social security system (consisting of various insurance schemes). Contributions to these insurance schemes are based on earnings and are collected via the annual Dutch personal income tax assessment. Social security contributions are effectively capped annually at EUR9,808 (2022).

The Netherlands grants levy rebates (*heffingskortingen*), the most important of which are:

- the general levy rebate of maximum EUR2,888 (2022) per year; and
- the employment levy rebate of maximum EUR4,541 (2022) per year.

The taxable period is 1 January to 31 December; tax returns must be filed before 1 May the next year; an extension for filing is possible upon request.

Box 1

Income from past and present employment, business activities, certain "other activities" (eg, freelance work), certain periodic payments and deemed income from the principal residence is taxed at a progressive rate in box 1 (see above).

Income from employment is generally subject to wage-withholding tax. This "pre-levy" can be offset against personal income tax. Income from business activities includes capital gains. Gains resulting from the normal administration of private wealth are usually not taxed in box 1.

The principal residence is allocated to box 1. Personal income tax is levied on the notional rental value (the *eigenwoningforfait* – a certain percentage of the residence's value for tax purposes); capital gains are tax-exempt. If certain requirements are met, interest paid on a loan for the acquisition, improvement and maintenance of a principal residence can be deducted for a maximum period of 30 years ("mortgage interest relief" or *hypotheekrenteaftrek*). The rate against which the deduction of mortgage interest in the highest income tax bracket takes place will be gradually reduced to 37.07% in 2023; it is currently limited to a rate of 40% (2022).

Box 2

In box 2, income and gains in connection with a substantial shareholding are taxed. A substantial interest, inter alia, exists in the case of a shareholding of 5% or more in a company (including, depending on circumstances, options on shares, profit rights and economic ownership). Income from a substantial interest includes both dividends and capital gains, and is taxed at a flat rate of 26.9% (2022).

For non-residents, box 2 applies mutatis mutandis, provided that the company in which the non-resident holds a substantial interest has its (deemed) place of effective management in the Netherlands. Tax treaties may prevent the Netherlands from levying its full domestic rate.

Dividends

Dividends paid by a company with its (deemed) place of effective management in the Netherlands are subject to 15% dividend withholding tax, which can be offset against any Dutch personal income tax due. For Dutch personal income tax (and dividend withholding tax) purposes, dividends and capital gains also include certain deemed dividends and deemed capital gains.

For example, a shareholder with a substantial interest in a non-resident low-taxed (less than 10% profit taxation) or exempt portfolio investment company is subject to personal income tax in box 2 on a deemed annual return (2022: 5.53% of the substantial interest's fair market value). The deemed return is reduced by actual dividends received during the year.

The Dutch government has published a legislative proposal to also tax a deemed benefit from a substantial interest insofar as loans were taken up in excess of EUR700,000 from a company in which a substantial interest is held. For the EUR700,000 threshold loans taken up by the

shareholder, a spouse and certain close relatives are aggregated. Under certain conditions, loans taken up by the shareholder for the acquisition, improvement and maintenance of a principal residence are excluded.

The legislation is expected to enter into force in 2023 (effective 31 December 2023).

Capital gains

Examples of deemed capital gains include the repurchase of shares by a company, the liquidation of the company, the inheritance of a substantial interest and (in the case of non-residents) the transfer of the place of effective management of the company out of the Netherlands.

A deemed capital gain also arises when the substantial shareholder emigrates from the Netherlands. Upon emigration, the Dutch tax authorities will issue a protective assessment (*conserverende aanslag*) for the 26.9% (2022) personal income tax due on the capital gain deemed as realised. An interest-free delay for tax payment for an unlimited period is granted automatically (for emigration within the EU/EEA) or upon request (for emigration outside the EU/EEA; security must be provided).

The delay for tax payment is withdrawn, and a protective assessment is (partially) collected, if (among others) the emigrated substantial shareholder receives a dividend or realises a (deemed) capital gain. The delay for tax payment is also withdrawn upon the emigrated taxpayer's death. Heirs can only request a further delay of payment of tax to the extent that the substantial shareholding represents active business assets.

Box 3

In box 3, privately held savings and portfolio investments are taxed at a flat rate of 31% (2022). The flat rate is applied to a deemed yield on the fair market value of the assets minus liabilities on 1 January of each year (net wealth). The actual income, gains and cash flow arising from the assets are irrelevant for box 3.

The net wealth is allocated to a low-yielding (deemed yield of -0.01% in 2022) and high-yielding (deemed yield of 5.53% in 2022) "return on investment class". The allocation of the net wealth to the high-yield class – and hence the deemed yield and effective tax rate – progressively increases with a taxpayer's net wealth.

For resident taxpayers, the taxable base includes all tangible and intangible assets and second houses (the principal residence is taxed in box 1 – see above). Movable property for personal use (eg, cars, yachts and art collections) is excluded from the taxable base, provided such property is not mainly held as an investment. For non-resident taxpayers, box 3 taxation is effectively limited to Dutch real estate and direct or indirect rights therein. Debts connected to Dutch real estate may be deducted.

For both resident and non-resident taxpayers, certain approved investments and savings below a threshold may be excluded from the taxable base. A tax exemption of EUR50,650 (2022) per year applies to every taxpayer individually; for tax purposes, partners (eg, spouses – see above) are eligible for a double tax exemption.

The box 3 income tax system has been widely criticised in the past and has been the subject of multiple court cases, because of the use of a (relatively high) deemed yield in a period where the (risk-free) market yields are historically low. As a result, taxpayers were confronted with an income tax burden in box 3 of more than 100% of the actual yield.

On 24 December 2021, the Dutch Supreme Court ruled that the box 3 income tax system is in violation of the ECHR, concluding that

affected taxpayers must be given (effective) legal protection through compensation aimed at the restoration of rights.

As a result of this ruling, a restoration of rights for the years 2017 to 2022 was announced, in the form of an adapted box 3 income tax system based on actual returns. The adapted system is called the "flat-rate savings alternative" (*forfaitaire spaarvariant*) and calculates the compensation payable based on applying a flat-rate yield depending on the actual composition of the assets, as follows.

- Savings:
  (a) 2017: 0.25%;
  (b) 2018: 0.12%;
  (c) 2019: 0.08%;
  (d) 2020: 0.04%;
  (e) 2021: 0.01%; and
  (f) 2022: TBD.
- Debts:
  (a) 2017: 3.43%;
  (b) 2018: 3.20%;
  (c) 2019: 3.00%;
  (d) 2020: 2.74%;
  (e) 2021: 2.46%; and
  (f) 2022: TBD.
- Other investments:
  (a) 2017: 5.39%;
  (b) 2018: 5.38%;
  (c) 2019: 5.59%;
  (d) 2020: 5.28%;
  (e) 2021: 5.69%; and
  (f) 2022: TBD.

For the time being, the restoration of rights for the years 2017 to 2020 is limited to persons who filed an objection and all taxpayers whose tax assessment is not yet final. For the years 2023 and 2024, legislation will be proposed whereby the flat-rate savings alternative will be transposed into legislation for the next two years.

Lastly, the government has announced its plan to introduce a new box 3 income tax system in the form of a capital growth tax (*vermogensaanwasbelasting*).

Taxation of the Assets of a Trust or Foundation

The Netherlands does not have trust law but does adhere to the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (the "Hague Trust Convention"). The Personal Income Tax Act 2001 and the Inheritance Tax Act 1956 regulate the tax treatment of (foreign) trusts and trust-like entities (eg, foundations), which mainly serve the personal interest of the settlor.

If an individual taxpayer (the settlor) transfers assets and liabilities into such a trust (or trust-like entity) without receiving economic entitlement rights (such as ownership of shares or profit sharing) in return, the transferred wealth will be regarded as a "separate private estate" (SPE, or *afgezonderd particulier vermogen*/APV) to which the "SPE regime" applies.

Under this regime, the transfer of assets and liabilities to such SPE for tax purposes is ignored. The SPE's assets and liabilities remain allocable to the settlor. The transfer of assets to a trust(-like entity) can therefore be tax-free, since such transfer is deemed not to have taken place.

Personal income tax is levied on the settlor (or their heirs). Exceptions may apply if, for example, a beneficiary receives a fixed interest (being a fixed economic entitlement). In this case, the beneficiary is subject to personal income tax on the fixed interest. The value of this interest is generally taxed in box 3 (depending on the nature of the assets and liabilities); the SPE regime does not apply to such a fixed interest.

Gift tax on payments made from the SPE to beneficiaries other than the settlor is assessed when the settlor is (deemed) resident in the Netherlands. The beneficiaries must also pay inheritance tax on trust assets upon the demise of the settlor if the settlor was a (deemed) Dutch resident.

Expatriates

For expatriates immigrating to the Netherlands (incoming employees), it is possible to apply for a so-called "30% ruling". Subject to certain terms and conditions, a 30% ruling allows for a deduction of 30% of the incoming employee's income for deemed extraterritorial expenses.

More importantly, the incoming employee can opt to be treated as a non-resident taxpayer for box 2 and box 3. As a result, the incoming employee will, in principle, not be taxed in the Netherlands on:

- a substantial interest in a company that is incorporated and effectively managed outside the Netherlands; and
- private wealth, except for (rights related to) Dutch real estate.

A 30% ruling is valid for five years. This five-year period is reduced by the period (in months) spent in the Netherlands ending in the 25-year period prior to immigration. A 30% ruling granted before 2019 is valid for eight years.

Non-residents

Non-resident individuals pay tax on income and wealth with a nexus to the Netherlands. Generally speaking, this income consists of income from substantial interests held in Dutch resident companies (box 2), Dutch real estate and direct or indirect rights therein (box 3), and rights to shares in the profit of an enterprise that has its place of effective management in the Netherlands (box 1). The actual Dutch tax liability is subject to the application of a treaty for the avoidance of double taxation.

Tax Treaties

The Netherlands has concluded a significant number of tax treaties, which, under Dutch law, override national (tax) legislation. As part of the OECD BEPS project, the Netherlands has endorsed the Multilateral Instrument (MLI).

The MLI applies to a large number of tax treaties concluded by the Netherlands and forms the basis of (future) tax treaty negotiations. In light of this development, it is expected that tax treaties can no longer be invoked for structures/transactions, which are mainly tax-driven and lack economic reality and substance.

Gift, Estate and Inheritance Taxes

In the Netherlands, gift and inheritance tax is levied pursuant to the Inheritance Tax Act 1956. An inheritance tax return must be filed within eight months of the death of the deceased. Postponement is granted upon request. The tax must be paid within six weeks of a notice of assessment.

If an heir living abroad receives property from a Dutch resident's estate, the heirs living in the Netherlands are also liable for the payment of the non-resident heir's taxes.

Declarations for gift tax must be filed within two months of the end of the calendar year in which the gift was made.

Gift tax is payable on lifetime gifts made by a (deemed) resident of the Netherlands. Regardless of their nationality, and for gift tax purposes only, all persons who emigrate from the Netherlands are deemed resident for a period of one year after emigration. Dutch citizens (at the time of emigration and the gift) are deemed resident for a period of ten years after emigration.

Inheritance tax is payable on the worldwide property of a (deemed) resident of the Netherlands at the time of their death. The inheritance tax is payable by the recipient. Dutch citizens (at the time of emigration and death) are deemed resident for a period of ten years after emigration. The estate of a non-resident deceased person (either non-Dutch or Dutch but emigrated more than ten years ago) is not subject to Dutch inheritance tax.

Tax calculation

For the calculation of gift and inheritance tax, assets are valued at fair market value. The (progressive) rates for both gift and inheritance tax are the same (in 2022):

- up to EUR130,425 – 10% (spouses/children), 18% (other descendants), 30% (others); and
- EUR130,425 and more – 20% (spouses/children), 36% (other descendants), 40% (others).

There are individual tax exemptions for both inheritance and gift tax, which depend on the relationship between the deceased or donor and the beneficiary (see **1.2 Exemptions**).

Taxation of the Assets of a Trust or Foundation

The Netherlands does not have trust law. The tax treatment of (foreign) trusts and trust-like entities is regulated by the Personal Income Tax Act 2001 and the Inheritance Tax Act 1956 (see *Personal Income Tax in the Netherlands*, above).

Real Estate Transfer Tax

The acquisition of Dutch real estate is subject to real estate transfer tax (*overdrachtsbelasting* or RETT) at a flat rate of 8% (commercial real estate) or 2% (residential real estate). An increase of the 8% rate to 10.1% is expected for 2023. A RETT exemption applies for people between the ages of 18 and 35 who acquire residential property that acts as their principal dwelling, whereby the value of such property may not exceed EUR400,000. RETT on the acquisition by resident beneficiaries of gifted real estate may be (partly) offset against gift tax; real estate acquired by inheritance is RETT exempt.

To prevent tax avoidance, under certain conditions shareholdings in real estate companies are deemed real estate for RETT purposes. This may also include shareholdings in non-resident (holding) companies if these shareholdings directly/indirectly derive their value from real estate located in the Netherlands.

Capital Gains Tax

The Netherlands does not levy a separate capital gains tax, but certain capital gains for individuals may be subject to Dutch personal income tax. These include capital gains derived from a substantial interest (personal income tax in box 2 – see above) and capital gains realised by an entrepreneur (personal income tax in box 1 – see above).

Dutch VAT

Dutch VAT is charged on the supply of goods and services in the Netherlands, at a basic rate of 21% (2022). Certain supplies (eg, educational services, medical services and financial services) are VAT-exempt. A reduced rate of 9% (2022) applies to other supplies (eg, food, non-alcoholic drinks, medicines and books) and services (eg, passenger transport, hairdressing and renting out holiday homes).

Imported works of art may also be eligible for the reduced rate.

1.2 Exemptions

There are individual tax exemptions for both inheritance and gift tax, which depend on the relationship between the deceased or donor and the beneficiary.

Inheritance Tax

The exemptions are as follows (in 2022):

- for partners – EUR680,645 (half of the cash value of pension rights derived by the partner from the death of the deceased is deducted from this amount; the minimum exemption is EUR175,837);
- for children whose cost of living was, for the greatest part, paid by the deceased and who cannot be expected, within the coming three years, to earn half of the income a physically and mentally healthy person would earn – EUR64,666;
- for other children and grandchildren – EUR21,559;
- for parents – EUR51,053; and
- for others – EUR2,274.

Gift Tax

The annual tax exemptions are (in 2022):

- for children – EUR5,677; and
- for others – EUR2,274.

Certain one-time increases apply – eg, for gifts related to the acquisition or renovation of a principal residence (*eigen woning*) or gifts used to repay a debt related to the principal residence (see **2.6 Transfer of Assets: Vehicle and Planning Mechanisms**).

The Inheritance Tax Act 1956 provides for a separate tax facility for business assets and substantial shareholdings that represent business assets: the business succession facilities (*bedrijfsopvolgingsfaciliteit* or BOR – see **4.2 Succession Planning**).

Gifts and bequests to registered charities are, in principle, exempt from Dutch gift and inheritance tax.

1.3 Income Tax Planning

Upon the immigration of a taxpayer who holds a substantial interest, under certain conditions, a step-up can be granted to the fair market value of the shares at the time of immigration. A step-up may not be (fully) granted if the taxpayer has previously resided in the Netherlands, or if the taxpayer has previously qualified as a non-resident taxpayer with regard to the substantial interest.

Under certain conditions, expatriates immigrating to the Netherlands can apply a favourable tax regime (30% ruling), which exempts certain types of income from personal income tax for a period of five years, in principle – see **1.1 Tax Regimes** (Expatriates).

1.4 Taxation of Real Estate Owned by Non-residents

Non-resident individuals pay tax on certain items of Dutch income and assets, such as income from substantial interests held in Dutch resident companies (including companies owning Dutch real estate), income from Dutch real estate and income derived from direct or indirect rights to Dutch real estate (see **1.1 Tax Regimes** for applicable rates). The actual Dutch tax liability is subject to the application of tax treaties.

1.5 Stability of the Estate and Transfer Tax Laws

The gift and inheritance tax legislation in the Netherlands is very stable. Amendments can only be made after a thorough legislative process.

At the start of its governing period, each government presents a coalition agreement in which its long-term (tax) objectives and policies are announced. In addition, the Dutch government announces its Tax Plan each year on Budget Day in September. The Tax Plan provides an overview of all tax measures proposed by the government

for the coming year and must be adopted by the house of representatives and the senate.

Neither the present coalition agreement nor the Tax Plan 2022 include significant changes to Dutch gift and inheritance tax. However, it is anticipated that the Dutch government may revise the Dutch business succession facilities, making them less attractive (see **4.2 Succession Planning**).

1.6 Transparency and Increased Global Reporting

The Netherlands is involved in the US Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS) and various other multinational transparency initiatives.

FATCA and CRS

Based on FATCA legislation, Dutch financial institutions need to register with the US Internal Revenue Service (IRS) and report information to the Dutch tax authorities about US reportable accounts and accounts held by non-compliant foreign financial institutions. The reportable information includes the name, address, US Tax Identification Number (TIN), account numbers and the account balances of reportable accounts. A non-US entity not qualifying as a financial institution needs to disclose its substantial US owners or certify that it has none.

The Netherlands has also committed itself to the CRS, under which financial institutions need to identify their account holders. If it is established that an account holder is a tax resident in another country that participates in the CRS, the financial institution has to submit information annually about the account holder and the account (such as investment income, interest, account balances and capital gains).

The Dutch tax authorities will subsequently exchange this information with the tax authorities of the account holder's country of residence.

Automatic Exchange of Information Between Countries

BEPS Action 5 contains an OECD framework for the compulsory exchange of information on certain categories of rulings. The Netherlands has committed itself to this OECD framework. The Dutch tax authorities collect basic information, such as the identity of the taxpayer, the date of issuance of the ruling, the start date, the identification of any entity likely to be affected and a short summary of the content. This information will then be bilaterally exchanged with:

- the countries of residence of all related parties; and
- the residence country of the ultimate parent company and the immediate parent company.

In the Directive on Administrative Co-operation, the EU also includes automatic exchanges of information on "advance cross-border rulings" and "advance pricing arrangements" between EU Member States. Contrary to BEPS Action 5, the scope of the EU Directive is not limited to certain categories of rulings; only rulings and pricing arrangements concerning purely domestic situations are out of scope, and rulings and pricing arrangements exclusively concerning the tax affairs of one or more natural persons. The information to be exchanged under the EU Directive is comparable to BEPS Action 5 and must be submitted to a central database to which all EU Member States have access.

The information will not be available to the public; upon request and when needed for tax purposes, additional information may be provided to another EU Member State.

UBO Register

Following up on the EU Anti-money Laundering Directive, a law has been adopted in the Netherlands (the UBO Register Act) that implements a register in which the ultimate beneficial owners (UBOs) of certain corporate entities and other legal entities must be registered, on the UBO register. Since 27 September 2020, these entities are required to obtain, hold and register certain personal information on their UBOs. The deadline for existing entities to register their UBO(s) lapsed on 27 March 2022. Newly incorporated entities will need to register their UBO information simultaneously with their registration.

Private limited companies and public limited companies, foundations, associations, mutual insurance associations, co-operatives, limited partnerships and churches or spiritual organisations that are incorporated or established under Dutch law are all subject to registration. Although the definition of a UBO differs for each type of legal entity, in general an individual must be registered if they hold an economic and/or controlling interest of more than 25% in the entity. If there is no such individual, all members of the senior management of the legal entity have to be registered (so-called "pseudo-UBOs").

The UBO register includes the personal information of a UBO, such as surname, month and year of birth, nationality, country of residence and the nature and extent of the beneficial interest; this information will be publicly accessible in the Dutch Trade Register. Additional information such as the UBO's Citizen Service Number (*Burgerservicenummer* or BSN), a copy of their identity document and the date and place of their birth will be accessible only to certain competent (EU) authorities.

Upon request, access to UBO information can be restricted to the public if the UBO is a minor or is otherwise legally incapable, or if the UBO is under the protection of the Public Prosecutor or the National Co-ordinator for Counterterrorism and Security.

Trust register

On 23 November 2021, a legislative proposal for the implementation of a UBO register for trusts and similar legal arrangements (the Trust register) was approved by the Dutch Senate. Similar legal arrangements include the commonly used Dutch mutual fund (*fonds voor gemene rekening*). The registration requirements are applicable to a trustee that:

- resides or is established in the Netherlands; or
- resides or is established outside the EU; and
- acquires Dutch real estate on behalf of the trust or enters into a business relationship in the Netherlands on behalf of the trust – for example with:
  (a) a financial institution;
  (b) an accountant;
  (c) a lawyer;
  (d) a civil law notary; or
  (e) a tax adviser.

The UBOs of a trust are the settlor(s), trustee(s), protector(s), beneficiaries or classes of beneficiaries and any other natural person ultimately exercising control over the trust. The Trust register will be publicly accessible. Information to be submitted is comparable to that of the UBO register.

The Trust register should have been implemented on 10 March 2020, but the Netherlands did not meet the deadline; the Trust register is now expected to enter into force in October 2022. Trustees will have three months to register the UBOs of trusts. After this transition period, trustees must comply with the registration requirements within one week. Changes of the UBO

must also be registered within one week of occurring.

Mandatory Disclosure

Based on the Mandatory Disclosure Directive, the Netherlands implemented rules obliging EU-linked intermediaries (such as lawyers, tax advisers and bankers) and, under certain circumstances (eg, if the intermediary involved is entitled to legal professional privilege), the taxpayers themselves to report certain arrangements to the Dutch tax authorities. These arrangements are potentially aggressive tax planning arrangements with a cross-border dimension and arrangements that are designed to circumvent reporting requirements like CRS and UBO reporting.

Information that needs to be reported includes the taxpayer's (and intermediary's) identity, a summary of the content of the reportable cross-border arrangement and details of the tax provisions on which the arrangement is based. The tax authorities will automatically exchange the information within the EU through a centralised database.

2. SUCCESSION

2.1 Cultural Considerations in Succession Planning

This is not applicable in the Netherlands.

2.2 International Planning

The Netherlands has entered into various tax treaties in relation to personal and corporate income tax (see **1.1 Tax Regimes**). These tax treaties may be affected by the MLI as of 1 January 2020.

The MLI is a multilateral tax treaty, pursuant to which new provisions and amendments resulting from the BEPS project – aimed at preventing tax treaty abuses and (more generally) tackling international tax avoidance – can be incorporated into existing bilateral tax treaties. Among others, these provisions and amendments include anti-abuse measures, in short denying tax treaty benefits to cross-border structures that lack sufficient economic reality. These measures may affect international family-owned businesses' eligibility for tax treaty benefits. High net worth individuals making investments through (deemed) passive holding companies may also be affected.

The MLI will not affect Dutch gift and inheritance tax treaties (see **1.1 Tax Regimes**).

2.3 Forced Heirship Laws

Children of the deceased have forced heirship rights (*legitieme portie*). They can be disinherited but may always make a monetary claim for 50% of the value of the share they would have received on intestacy. This claim needs to be made within five years of the deceased's death; the forced heirship claim lapses after this five-year period.

The children's forced heirship rights only apply with respect to the estate of their deceased parent. Therefore, if the deceased was married and the community of property regime applied, for example, the children are in equal shares entitled to a quarter of the total property of the deceased and the deceased's spouse, since their deceased parent's estate comprised only half of the total property.

A child who claims their forced heirship rights does not become an heir but has a monetary claim against the deceased parent's estate. This claim can be recovered from estate assets. If the estate is insufficient to recover the entire claim, the children can recover their claims from certain gifts that were made by the deceased, such as:

- gifts made within five years preceding the death of the deceased;
- gifts made to descendants; and/or
- gifts made with the intention of infringing upon forced heirship rights.

The children may recover their claim from trust assets if the trust settlement is considered a donation by the deceased. Children can collect their forced heirship rights six months after their parent's death. However, the parent's will may contain a provision that the children can only collect their forced heirship rights after the death of their deceased parent's spouse or registered partner, or life partner with whom the parent entered into a notarial co-habitation agreement.

This provision can also apply if the deceased's spouse, registered partner or life partner is not a parent of the children.

A disinherited spouse or registered partner also has some statutory rights, including:

- a claim of the usufruct of the family home and household effects; and
- a claim of the usufruct of other estate assets if the spouse or registered partner needs this for their maintenance (considering all circumstances).

In December 2020, a report was published by the Centre for Notarial Law of the Radboud University and *Netwerk Notarissen* about the forced heirship rights and the possible abolition thereof. The Dutch government responded that there is no urgent and widespread need or practical problem that requires proceeding to an abolition or modification of the forced heirship rights in the short term.

2.4 Marital Property

Before 1 January 2018, the default marital property regime in the Netherlands was full community of property. This community included all property acquired before or during the marriage, even if acquired by inheritance, legacy or gift, unless the testator or donor had stipulated that the property was private property.

For marriages entered into on or after 1 January 2018, the default community of property is limited to the assets acquired during the marriage and excludes all property individually acquired prior to the marriage, as well as all property acquired by inheritance, legacy or gift.

Certain assets that are very closely connected to a spouse (eg, compensation for disability) are excluded from the community of property regime (in both the old and new regimes).

End of a Marriage

If the marriage ends by the death of a spouse or by divorce, the community of property is automatically dissolved. All assets must be divided equally between the surviving spouse and the heirs of the deceased spouse in the case of death, or between the ex-spouses in the case of divorce. Entering into a community of property, either by marriage or by amending marriage conditions (see below) during the marriage, is not regarded as a gift that must be taken into account in determining the children's forced heirship rights.

Prenuptial and Postnuptial Agreements

The spouses can agree that the default regime does not apply (prenuptial or postnuptial agreement, or *huwelijksvoorwaarden*). A prenuptial or postnuptial agreement must be incorporated in a deed and executed before a Dutch civil law notary, and may be amended during the marriage.

The spouses can freely negotiate a prenuptial or postnuptial agreement and can, among other things:

- exclude or include any or all of the property from the default community of property regime;
- include a periodical settlement clause regarding saved income after the household expenses have been paid; and/or
- agree on a final settlement clause, according to which, at the end of the marriage by divorce and/or death, the value of property is settled as if the spouses were subject to a community of property.

2.5 Transfer of Property

In principle, the transfer of assets in box 1 or box 2 is a taxable event for Dutch personal income tax purposes (see **1.1 Tax Regimes**). The transferor will be taxed on a (deemed) capital gain – ie, the difference between the cost price for tax purposes of the transferred asset and the consideration (or at least the fair market value) received.

For the transferee, the cost price for tax purposes of the acquired asset will be equal to the consideration (or at least the fair market value). Hence, the transferee will only be taxed on future (deemed) capital gains.

The Dutch Personal Income Tax Act 2001 provides for several exemptions to this method of taxation. For example, subject to strict terms and conditions, the levy of personal income tax may, upon request, be deferred in the case of a business reorganisation (box 1) or a transfer of business assets or a substantial shareholding that represents business assets (see **4.2 Succession Planning**). If such deferral is granted, the transferor's cost price for tax purposes is passed on to the transferee. A future (deemed) capital gain will then also include the gain for which deferral was granted.

2.6 Transfer of Assets: Vehicle and Planning Mechanisms

In addition to the general inheritance and gift tax allowances mentioned in **1.2 Exemptions**, a few specific exemptions exist to make the transfer of assets to younger generations more feasible.

For Dutch gift tax purposes, a child of the donor gets a one-time increase of their annual exemption to EUR27,231 (2022) if they are aged between 18 and 40 at the time of the gift. Alternatively, a taxpayer may also opt for a one-time increase to EUR106,671 (2022) if the gift relates to the acquisition or renovation of a principal residence (*eigen woning*) or is used to repay a debt related to the principal residence. Opting for one of these one-time increases rules out the possibility of opting for the other later. The one-time increase to EUR106,671 will be reduced on 1 January 2023 to EUR 27,231 and abolished on 1 January 2024.

The Personal Income Tax Act 2001 and the Inheritance Tax Act 1956 provide for the transfer of business assets and substantial shareholdings that represent business assets by the business succession facilities (BOR). These facilities are discussed further in **4.2 Succession Planning**.

Dutch tax legislation also provides for tax allowances for qualifying country estates. The transfer and possession of (shareholdings in) such estates is – in whole or in part – exempt from Dutch personal income tax, gift and inheritance tax and real estate transfer tax. Country estate holding companies are also exempt from corporate income tax. The application of this exemption is subject to strict terms and conditions.

2.7 Transfer of Assets: Digital Assets

Dutch law does not provide specific rules regarding the succession of digital assets. Cryptocurrency is considered to be an asset that can be transferred from one person to another, and can

be left to a beneficiary in a will. Dutch law does not provide a solution regarding the practical issues that the transfer of digital assets may have, such as unknown passwords.

According to the Dutch tax authorities, for Dutch personal income tax purposes, income from cryptocurrency may be taxed in box 1 if the generated income is regarded as income from business activities or other activities that are taxed in box 1. If the income is not taxed in box 1, a deemed return over the fair market value of the cryptocurrency will be taxed in box 3.

If cryptocurrency is transferred by way of inheritance or donation, inheritance tax or gift tax will be levied if the holder of the cryptocurrency was (deemed) resident in the Netherlands either at the time of their death or at the time of the donation. The tax will be levied over the value of the cryptocurrency at that moment and is payable by the beneficiary. See **1.1 Tax Regimes**.

3. TRUSTS, FOUNDATIONS AND SIMILAR ENTITIES

3.1 Types of Trusts, Foundations or Similar Entities

In the Netherlands, a foundation is often used for tax and estate planning purposes. A foundation under Dutch law is a legal entity, meaning that the liability of persons involved with it (eg, board members) is limited.

A foundation is incorporated through the execution of a notarial deed before a Dutch civil law notary, containing the foundation's articles of association.

The main characteristics of a Dutch foundation are that:

- it does not have members or shareholders;
- the aim is to realise the objectives (which cannot contravene the law) as described in the articles of association for which the foundation uses its capital; and
- it only has one mandatory corporate body, its board, but can have other bodies such as a supervisory and/or advisory board.

Dutch Foundations as Fiduciaries

Dutch foundations are often used as fiduciary foundations (STAK). When used as such, assets (eg, shares in a company, an art collection or investments) are transferred to the foundation to be held in administration, against the issuance of depository receipts (*certificaten*) by the foundation. This creates a separation between the legal title to (*juridische gerechtigdheid*) and the beneficial ownership of (*economische gerechtigdheid*) the assets.

The relationship between the STAK and the depository receipt holders is governed by the trust conditions (*administratievoorwaarden*), which are often established by the board of the foundation and imposed on anyone acquiring depositary receipts.

Trust foundations and charitable foundations are often used in wealth and charitable planning.

3.2 Recognition of Trusts

The Netherlands does not have trust law. However, as the Netherlands adheres to the Hague Trust Convention, it does recognise foreign trusts if they are created according to the rules thereof.

In principle, trust assets are not affected by succession law (including forced heirship rules). However, it is theoretically possible that the settlement of assets into a trust could be regarded as a gift that harms forced heirship claims, which could result in a claim by a forced heir to the trust assets.

Under the Hague Trust Convention, a trust may not need to be recognised if it harms forced heirship entitlements.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation

Trust Foundation

For Dutch personal income tax and gift and inheritance tax purposes, a Dutch trust foundation (or other trust/trust-like entity) is generally qualified as an SPE, to which the SPE regime applies (see **1.1 Tax Regimes**). Under this regime, the transfer of assets and liabilities for personal income tax purposes is ignored, and the assets and liabilities remain allocable to the donor. As a result, the foundation (the trustee) is not taxed separately.

The SPE regime does not extend to Dutch corporate income tax: for the purpose of this tax, the assets and liabilities of a trust foundation are not allocated to the donor. It should therefore be verified whether the trust foundation is subject to corporate income tax. This would only be the case insofar as a trust foundation carries on a business enterprise or owns Dutch real estate.

If the trust foundation's assets and liabilities consist of portfolio investments or mere shareholdings, it would generally not be subject to corporate income tax.

Fiduciary Foundation

A Dutch fiduciary foundation or STAK (see **3.1 Types of Trusts, Foundations or Similar Entities**) is considered to be the legal owner of the assets and liabilities transferred to it. Beneficial ownership lies with the depositary receipt holders. Therefore, a STAK has liability to its depositary receipt holders equal to the value of the assets and liabilities it holds in administration, and has no equity or taxable income of its own. As such, a STAK is not taxed separately.

If structured properly (through articles of association and trust conditions), a STAK is considered fully transparent for tax purposes. Its depositary receipts are then fully assimilated to the underlying assets. However, if under the trust conditions it is no longer possible to identify the underlying assets with the depositary receipts, a deemed transfer of assets may be recognised for Dutch tax purposes.

Because of its characteristics – not taxed separately, flexible articles of association (see **4.1 Asset Protection**) and the assimilation of its assets and liabilities to the depositary receipts – a STAK is often used in wealth/holding structures for family governance purposes.

3.4 Exercising Control Over Irrevocable Planning Vehicles

A Dutch foundation can be used as a civil law trust. This means that an individual donates assets to the foundation and imposes an obligation on the foundation to distribute the assets and the income arising therefrom to certain beneficiaries. The foundation becomes the legal owner of the assets, although it only holds them temporarily.

The foundation can be given discretionary powers to decide when and how it makes distributions to its beneficiaries. The individual can retain some control by being a board member of the foundation or by having the power to remove and appoint board members. The donation to the foundation can also be revocable.

4. FAMILY BUSINESS PLANNING

4.1 Asset Protection

In the Netherlands, a STAK (see **3.1 Types of Trusts, Foundations or Similar Entities**) is often used in estate planning – eg, as a method

to safeguard continuity within a company. By transferring the shares in the family business (the top holding company) to a STAK against the issuance of depositary receipts, beneficial ownership is effectively separated from legal ownership. This allows for a transfer to the next generation (eg, by donating the depositary receipts) while remaining in control of the family business through the board of the STAK.

Dividends and future capital gains derived from the shares will accrue to the depositary receipts holders without any inheritance or gift tax being due.

The shareholder can strengthen the continuity of the family business by making specific arrangements regarding the constitution of the board of the STAK once the shareholder has resigned as board member. Because Dutch law contains very few requirements in this respect, the contents of the articles of association of a STAK can be tailored to a great extent (especially regarding the organisation and voting powers).

4.2 Succession Planning

Business Succession

The Inheritance Tax Act 1956 and the Personal Income Tax Act 2001 provide for a tax facility for the transfer of business assets and substantial shareholdings that represent business assets as part of a business succession: the business succession facilities (BOR). Subject to strict terms and conditions, the following inheritance tax and gift tax characteristics apply to the transfer of such assets and shareholdings.

- Assets and shareholdings are valued as a going concern. If the liquidation value of a business exceeds the going concern value, the difference can be conditionally tax exempt.
- EUR1,134,403 (2022) of the going-concern value and 83% in excess of EUR1,134,403 of the going-concern value can be conditionally tax exempt.
- A conditional extension for payment of the tax on the remaining 17% of the going-concern value in excess of EUR1,134,403 can be obtained for a period of ten years.

One of the conditions is that the business must be continued for a period of five years after the gift or the death of the deceased.

In addition, the levy of Dutch personal income tax may be (partly) deferred if certain requirements are met. Deferral is only possible for the transfer of business assets (box 1) and substantial shareholdings that represent business assets (box 2). For both boxes, the main requirement is that the successor has been working with the enterprise for at least 36 months prior to the transfer. For business assets and substantial shareholdings that represent business assets acquired from an estate at death, the "36-month requirement" does not apply.

There is often discussion whether business succession facilities can be applied to real estate portfolios (including substantial shareholdings in real estate companies). In most cases, the Dutch tax authorities take the position that real estate portfolios are to be considered passive investment assets (instead of business assets) to which business succession facilities cannot be applied. Recent case law indicates that, under certain circumstances, this point of view may be too strict; if certain requirements are met, real estate portfolios could qualify as business assets.

Those qualifying assets should therefore be eligible for business succession facilities. Nevertheless, the qualification of real estate portfolios as business assets or as passive investments continues to be a topic of discussion with the tax authorities.

It is anticipated that the Dutch government may revise the Dutch business succession facilities, making them less attractive, but no legislative proposal to this end has yet been published (as of 30 June 2022).

4.3 Transfer of Partial Interest

For Dutch income tax and gift and inheritance tax purposes, a partial interest in an entity is taken into account for at least its fair market value at the time of transfer.

The fair market value of listed securities is based on the closing price as shown in the Official List of a certain exchange on the day prior to the transfer. For other (partial) interests, the fair market value has to be determined on a case-by-case basis. A taxpayer may take into account a discount for lack of marketability and control, for example, if the shareholding represents a minority interest or is subject to a right of first refusal (*aanbiedingsregeling*). A blocking clause (*blokkeringsregeling*) contained in the articles of incorporation is generally not considered to be of relevance.

It should be emphasised that case law on this point is highly casuistic. Whether a discount may be taken into account therefore strongly depends on the facts and circumstances of each case and is likely to be a topic of discussion with the Dutch tax authorities.

5. WEALTH DISPUTES

5.1 Trends Driving Disputes

In general, the number of disputes concerning Dutch inheritance law is limited, although growing. This is mainly due to the fact that the inheritance law is relatively modern (the current legislation was introduced in 2003) and a deceased has to dispose of their estate by notarial deed. To execute such a deed, a Dutch civil law notary, among others, has to verify a person's capacity and whether that person's wishes are correctly incorporated in their will.

A growing number of disputes relate to the use (or abuse) of a durable power of attorney (see **8.1 Special Planning Mechanisms**).

Regarding Dutch tax law, wealth disputes, among others, concern the Dutch personal income tax on a deemed annual yield in box 3 (see **1.1 Tax Regimes**). Box 3 taxation has been subject to much (social) debate. For 2017 and 2018, the Supreme Court ruled that the box 3 income tax system is in violation of the ECHR, resulting in a restoration of rights in the form of the flat-rate savings alternative for the years 2017 to 2022, and the introduction of legislation for a new box 3 income tax system for the years to come.

There are also tax disputes regarding the applicability of the Dutch business succession facilities, mainly in relation to real estate. Reference is made to this in **4.2 Succession Planning**.

5.2 Mechanism for Compensation

This is not applicable in the Netherlands.

6. ROLES AND RESPONSIBILITIES OF FIDUCIARIES

6.1 Prevalence of Corporate Fiduciaries

This is not applicable in the Netherlands.

6.2 Fiduciary Liabilities

This is not applicable in the Netherlands.

6.3 Fiduciary Regulation

This is not applicable in the Netherlands.

6.4 Fiduciary Investment

This is not applicable in the Netherlands.

7. CITIZENSHIP AND RESIDENCY

7.1 Requirements for Domicile, Residency and Citizenship

Foreign nationals who wish to reside in the Netherlands for more than three months need a residence permit, for which they must file an application with the Immigration and Naturalisation Service (IND). Most foreign nationals need to apply for a regular provisional residence permit (MVV) before entering the Netherlands.

No residence permit or MVV is required for a stay of less than three months; a visa will suffice. Specific rules apply for EU (except for Romanian and Bulgarian) nationals, European Entrepreneurial Region (EER) nationals and Swiss nationals, who do not require a permit.

Employers are required to obtain a work permit before hiring a non-EU employee. In most cases, this work permit will only be granted if it is established that the employer was unable to find suitable personnel in the Netherlands or elsewhere in the EU. An exemption applies to highly skilled migrants (eg, a migrant who has completed a master's or post-doctoral programme or obtained a PhD at a designated educational institution abroad), and certain scientific researchers. Certain professions may only be practised in the Netherlands if the employee has the correct certificate.

If a foreign national stays in the Netherlands for a period of more than four months, they are obliged to register with the Dutch Municipal Personal Records Database (*Basisregistratie Personen* – BRP). In order to obtain (or regain) Dutch citizenship, an individual who has reached majority has, in general, two alternative routes to follow: the "option procedure" or "naturalisation".

The option procedure is only available to certain foreign nationals but is the fastest and easiest way to become a Dutch citizen, taking approximately three months to complete. For example, an individual may qualify for this procedure after living in the Netherlands for a certain period of time or if they are a former Dutch citizen.

The process of naturalisation may take up to one year. Official documents – such as a passport or residence permit, a marriage certificate and a child's birth certificate – need to be submitted, along with a civic integration certificate.

7.2 Expeditious Citizenship

There are no expeditious means for an individual to obtain Dutch citizenship.

8. PLANNING FOR MINORS, ADULTS WITH DISABILITIES AND ELDERS

8.1 Special Planning Mechanisms

Anyone under the age of 18 in the Netherlands is considered a minor. A minor can own assets, which are managed by their parents or guardian. A testator or donor can also appoint someone other than the minor's parents/guardian as administrator of the assets.

In the case of loss of capacity, a person can be put under legal restraint by a sub-district court. In this case, a legal guardian is appointed to represent the incapacitated person. A sub-district court can also impose a fiduciary administrator if an adult cannot administer their own property.

To plan for loss of capacity, a "living will" can be made. A living will usually provides for certain powers of attorney and may also provide for certain medical provisions (such as a "do not resuscitate order").

A durable power of attorney, granted before the loss of capacity, remains valid. Foreign powers of attorney are also generally recognised. A notarial power of attorney is required for certain legal acts, such as mortgaging immovable property in the Netherlands.

8.2 Appointment of a Guardian

In the case of loss of capacity, a person can be put under legal restraint by a sub-district court. A sub-district court order is also required if an adult is to be put under fiduciary administration.

The parents or guardian of a minor (a child under 18) need a sub-district court's authorisation for certain legal acts that significantly affect the minor's property, such as donations on behalf of the minor or the disposition of assets other than money.

8.3 Elder Law

In the case of loss of capacity, a person can be put under legal restraint. A legal guardian is appointed to represent the incapacitated person. To plan for loss of capacity, a person can also make a living will.

If an adult cannot administer their own property, a fiduciary administrator can be imposed to administer that adult's property.

A durable power of attorney, given before the loss of capacity, remains valid. Although foreign powers of attorney are generally recognised, a notarial power of attorney is required for certain legal acts, such as mortgaging immovable property in the Netherlands. See **8.1 Special Planning Mechanisms** and **8.2 Appointment of a Guardian**.

9. PLANNING FOR NON-TRADITIONAL FAMILIES

9.1 Children

The laws in the Netherlands stipulate that the determining factor for a child's legal position is whether "legal family ties" exist between the child and the deceased.

Legal family ties between the child and their mother arise through birth or adoption. Legal family ties between the child and their father arise through:

- birth within wedlock (or during a registered civil partnership);
- formal recognition of the child by the father;
- judicial establishment of paternity; or
- adoption.

If a child has legal family ties with a parent, regardless of how they arose, the child is an intestate heir and is entitled to a statutory share (see **2.3 Forced Heirship Laws**).

Biological children who have no legal family ties and stepchildren are not intestate heirs and are not entitled to a statutory share. They can, however, be appointed as beneficiaries in a will.

Modernising Dutch Law

In 2016, the Government Committee Rethinking Parenthood published its recommendations to modernise Dutch law with respect to (among others) multi-parenthood and surrogate motherhood. The Committee recommended to provide legislation:

- allowing a child to have more than two legal parents (ie, "multi-parenthood"); and
- specifically aimed at surrogate motherhood.

In 2019, the Dutch government published its appraisal of these recommendations. The gov-

ernment decided it will not pursue multi-parenthood (instead, it proposes shared custody for those involved), but will follow through on legislation for surrogate motherhood. The first legislative proposal has already been made.

9.2 Same-Sex Marriage

In the Netherlands, same-sex couples can get married or enter into a registered civil partnership. They are treated equally to heterosexual couples in relation to property, gifts and inheritances, and tax law.

10. CHARITABLE PLANNING

10.1 Charitable Giving

Gifts and inheritances made by a Dutch resident to a designated charitable organisation (*algemeen nut beogende instelling* – ANBI) are exempt from gift and inheritance tax. A charity (usually a foundation or *stichting*) may qualify as an ANBI if it meets certain strict requirements, the most important being that at least 90% of the actual activities support the public interest. Gifts and certain "periodical gifts" to ANBIs are also deductible for personal income tax purposes. A deduction for personal income tax purposes is only allowed insofar as the gift exceeds 1% but does not exceed 10% of the donor's total income. For gifts to cultural ANBIs, a multiplier of 25% (with a maximum increase of EUR1,250) applies. There are no limitations for periodical gifts, which are fully deductible. To qualify as a periodical gift, the gift should consist of at least five fixed (regarding the amount) and regular (yearly) donations, and can be made by notarial deed or private instrument.

For resident companies, gifts to ANBIs are deductible for corporate income tax purposes. Gifts – including gifts made in connection with the charitable wishes of the shareholder – are deductible, up to a maximum of 50% of a company's profit, as long as this is not more than EUR100,000. A gift received from an ANBI is exempt from gift tax, provided the gift is made according to the charitable purpose of the ANBI. ANBIs do not qualify as SPEs for Dutch personal income tax purposes (see **1.1 Tax Regimes**) and are generally not subject to Dutch corporate income tax.

ANBIs do need to comply with certain public disclosure requirements. Among other information, ANBIs need to make available to the public the composition of the board, a current report of past and contemplated activities, and a financial report. ANBIs are also subject to CRS obligations and must be included in the UBO register (see **1.6 Transparency and Increased Global Reporting**).

10.2 Common Charitable Structures

In the Netherlands, the most commonly used charitable organisation is an ANBI (see **10.1 Charitable Giving**). It should be noted, however, that one of the requirements for charitable organisations to qualify as an ANBI is that assets are actually spent according to the charitable objective. Where a charitable organisation also has (long-term) investments, the Dutch tax authorities may take the position that the charitable organisation does not comply with this "spending requirement".

In this context, a committee (set up by the previous administration) concluded that new legislation should be implemented that requires ANBIs to carry out a certain minimum number of activities or spend a minimum amount of money on the public interest. More guidance in this respect is expected to be provided shortly.

Loyens & Loeff has a designated team dealing with family-owned businesses and private wealth, which offers tailored, personal advice to family offices and high net worth individuals, investment managers, private equity firms and multinational family enterprises. The team advises on the tax and legal structuring of family-owned businesses; the management and supervision of family-owned businesses and wealth; the protection of wealth and privacy; and the tax and legal structuring of succession planning, as well as valuable assets. It also offers legal support for those who are emigrating and/or repatriating; advice on prenuptial agreements and last wills; expertise in establishing (family) foundations and charitable organisations; and assistance in planning pension provision. There is full collaboration between the firm's tax advisers, civil law notaries and lawyers, enabling them to find pragmatic solutions to complex tax and legal issues. Clients can draw on specialist tax and legal knowledge in the firm's home markets (Benelux and Switzerland) and across its global (business) network.

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