**Study on Aggressive Tax Planning**

*Specific contract No13 under FWC TAXUD/2012/CC116*

**Appendix 1 - Questionnaire to national tax experts**

**Filled in for the Netherlands**





**QUESTIONNAIRE**

**The Netherlands**

## Abbreviations

**CIT – Corporate Income Tax**

**Wet Vpb – Wet op de Vennootschapsbelasting 1969**

**Wet DB – Wet op de dividendbelasting 1965**

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| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 25% (20% on the first EUR 200,000 of taxable profits). |
| 1. Some states offer special offshore tax regimes, providing for corporate tax-exemption of certain mobile income types (e.g. royalty) from abroad. Does your MS offer such a tax regime? If yes, please briefly explain, including the conditions to be met. | No. |
| *Dividends received* | |
| 1. Is it possible for a company in your MS to receive dividends from a foreign company free of tax (or at a greatly reduced rate of tax, e.g. 95% tax-exemption)? | Yes. Under the participation exemption qualifying dividends are tax exempt (for 100%). Refer art. 13 Wet Vpb.  In order to benefit from the participation exemption, the parent company must either be a Dutch tax resident subject to the regular Dutch corporate income tax rates, or a non-Dutch tax resident that carries out its enterprise or part thereof through a permanent establishment in the Netherlands to which the participation can be allocated. Furthermore, the participation must meet the following conditions:  (i) the parent company owns an interest of at least 5% of the issued and paid-up share capital\* in the subsidiary; and  (ii) the parent company does not hold the participation as a portfolio investment; or if it does, the portfolio investment participation meets the asset test and / or the subject to tax test.  \* A shareholding that represents at least 5% of a company’s voting rights also qualifies for the participation exemption if (a) that company is a tax resident in another EU Member State; (c) a tax treaty between the Netherlands and that Member State is in place; and (c) that tax treaty provides for reduced taxation at source on dividends based on voting rights. |
| 1. If yes to question 3: |  |
| 1. Does this apply regardless of the tax residence of the distributing company, e.g. Member State, treaty state, tax haven? | Yes. The participation exemption regime applies if the Dutch company owns 5% or more of the issued and paid-up share capital of the subsidiary and the parent company does not hold the participation as a portfolio investment; or if it does, the portfolio investment participation meets the asset test and / or the subject to tax test. This regardless where the distributing company is located. The participation exemption does not apply to low taxed portfolio investment participations. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | No. The participation exemption regime applies if the shareholder company holds at least 5% of the issued and paid-up share capital of the foreign subsidiary company. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | Yes, however this could be relevant for the subject to tax test. |
| 1. If yes to b, how will the recent amendment of Article 4 of the EU Parent/Subsidiary Directive, which requires Member States to tax dividends if they have been deducted by the subsidiary, affect your answer? | No proposed legislation available yet, however it is expected that as from 2016 the Dutch participation exemption would not apply anymore if the dividend is deductible at the level of the subsidiary. |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | In principle dividend tax must be withheld. However, there is an exemption from the obligation to withhold in art. 4 paragraph 2 Wet DB which is based on art. 5 of the PSD. Furthermore, a Dutch Cooperative is in principle not subject to Dutch dividend withholding tax provided certain conditions are met. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | No, a shareholding of at least 5% is required as the exemption only applies if the foreign shareholder company has an interest in the Dutch company on which the Dutch participation exemption would have been applicable if the foreign shareholder company would have been a tax resident of the Netherlands. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | The exemption only applies if the foreign shareholder company is resident in an EU Member State, an EEA Member State or Switzerland. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | Dutch tax law deals with the term ‘ultimate beneficiary’ (in Dutch: ‘*uiteindelijk gerechtigde’*) which is not entirely similar to the term beneficial ownership of the OECD model tax convention. |
| 1. Is the withholding tax exemption subject to any other anti-avoidance requirements, e.g. based on substance of the recipient? If yes, please briefly explain. | Dutch anti-dividend stripping rules of article 4 paragraph 7 Wet DB: The recipient of the dividends is not considered to be the ultimate beneficiary of the dividends if the recipient has paid a consideration in connection with the receipt of dividends as part of a series of transactions, whereby it can be assumed that another individual or company is, in fact, benefiting directly or indirectly from the receipt of the dividends and remains the ultimate beneficial owner.  Further, it is a requirement for the exemption to apply, that the foreign parent company:   1. is not a transparent entity, 2. has a function comparable with a Netherlands (taxable or exempt) investment institution and 3. is ineligible for a reduction of a treaty dividend withholding tax rate on the basis of an anti-abuse clause in a tax treaty.   (article 4 paragraph 3 Wet DB)  Furthermore, there is an anti-avoidance rule in art. 17 paragraph 3 subpar. b. If a foreign company holds a shareholding of at least 5 % in a Dutch company as a portfolio investment and with the main purpose or one the main purposes to avoid dividend withholding tax, it is subject to 15% corporate income tax on its dividend distributions.[[1]](#footnote-2) |
| 1. Is any other tax levied upon a distribution of a dividend by a company in your MS? | No. |
| 1. Are dividend equivalents (typically a buy-back of shares, a capital reduction-payment or a payment of liquidation proceeds) treated in a similar way as dividends and subject to withholding tax when paid to a foreign company? Please refer to question 4 and 5 above. | Yes, withholding tax is generally levied on dividend-equivalents to the same extent a distribution of dividends would have been subject to Dutch dividend withholding tax (art. 3 Wet DB). A capital reduction payment could take place exempt from Dutch dividend withholding tax provided certain conditions are met (art. 3 paragraph 1 sub d Wet DB). |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes, the (arm’s length) interest income is included in the taxable profit of the company and subject to the regular CIT rates. |
| 1. If such a loan is granted free of interest (i.e. on non-arm’s length-conditions), would the creditor company resident in your MS have to include any deemed interest income in its taxable income? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo B is tax resident in your MS. | Yes, FinanceCo B would need to report a deemed arm’s length interest income for Dutch CIT purposes (art. 8b Wet Vpb). |
| 1. Is it possible that an interest bearing financial instrument (hybrid loan) granted by a company resident in your MS to a foreign group member company could be qualified as an equity investment in your MS with the result that the return on the investment (treated as deductible interest in the state of the debtor company) is considered a tax exempt dividend or similar? When responding, please consider Model ATP-Structure no. 2 and assume that B Holdco is tax resident in your MS (regardless of the non-MS assumption in the description of the Model). | Yes, any return on the investment (hybrid loan) would be exempt from Dutch CIT under the participation exemption (provided all conditions are met). |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | Article 10, paragraph 1, letter d, Wet Vpb states that the interest on loans, as well as any appreciation or depreciation of these loans, that function as equity are not deductible (or taxable) for Dutch CIT purposes. This article covers so-called “participating loans” (i.e. pursuant to the terms of the debt, the creditor must be considered as participating to a certain extent in the enterprise of the debtor).  According to established case law (HR 11 March 1998, no. 32 240, BNB 1998/208 and HR 25 November 2005, no.’s 40 989 and 40 991, BNB 2006/82 and 83) a loan actually functions as equity if the following cumulative conditions are met (in Dutch: *‘deelnemerschapslening’*):  (i) the remuneration on the loan is for the most part contingent on the profit of the debtor;  (ii) the loan is subordinated to all other creditors; and  (iii) the loan has no fixed term and is only claimable upon bankruptcy, suspension of payment, or liquidation, or the loan has a term of more than 50 years.  The return on these hybrid loans are exempt under the participation exemption if the creditor has a participation in the company to which the loan has been granted. |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | No proposed legislation available yet, however it is expected that the Dutch participation exemption would not apply because a new provision will be included that the income is no longer exempt from Dutch CIT if the “interest” is deductible at the level of the subsidiary. |
| *Interest costs* | |
| 1. Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes. In general, interest payments are fully deductible as normal business expenses provided that the interest payments are in line with the arm’s length principle. However, the Wet Vpb provides for certain limitations on the deduction of (group) interest. |
| 1. If yes to 13, |  |
| 1. Does the tax deductibility depend on how the interest income is qualified for tax purposes in the creditor’s state? If yes, please briefly explain. | No. |
| 1. In particular, would your MS still allow a tax deduction if the creditor state treats the corresponding interest income as a non-taxable dividend or similar, i.e. if the loan is a hybrid loan? When responding, please consider Model ATP-Structure no. 2 and assume that C Holdco is tax resident in your MS. | Interest expenses would in principle be restricted at the level of C Holdco for Dutch CIT purposes (see under 16 d). |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | The Dutch thin capitalisation-rules have been abolished as from 1 January 2013. However, the Netherlands have the following interest deductions limitation rules:   * Art. 8b Wet Vpb: arm’s length principle, * Art. 10a Wet Vpb: anti base erosion provisions, * Art. 10b Wet Vpb: long term loan with low or no interest, * Art. 13l Wet Vpb: Dutch excess participation debt rules (also third party interest), * Art. 15ad Wet Vpb: leveraged acquisitions. These rules also apply if the acquisition holding is merged into targetcompany (art. 14b paragraph 9 Wet Vpb) and in case of a spin-off (art. 14a paragraph 12 Wet Vpb) and rules also apply with regard to third party interest. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | Art. 8b Wet Vpb: interest expenses paid to a related party would only be deductible to the extent that the interest expenses are considered to be at arm’s length.  Art. 10a Wet Vpb: In addition, deduction of interest is also denied if a related party grants a loan to the company and the company uses the funds for one of the following tainted transactions:   1. profit distributions or repayment of capital to a related company or related individual; 2. a capital contribution in a related company; or 3. the acquisition or an extension of a participation in a company which becomes a related company after this acquisition or extension.   However the deduction of interest is granted, if the debtor can provide evidence that:   1. the loan and the tainted transaction are mainly based on sound business reasons (double test); or 2. the interest is subject to sufficient, compensatory taxation in the hands of the recipient, which is the case if tax is levied at a rate of at least 10% on a taxable base calculated according to Netherlands tax standards. However, if the tax inspector can demonstrate that the loan or the transaction is not based on sound business reasons, the interest is not deductible even if it is taxed in the hands of the recipient at a rate of at least 10%.   Art. 10b Wet Vpb: Deduction of interest is denied where a loan with no fixed maturity or a maturity of more than 10 years obtained from a related company bears no interest or an interest rate which is substantially (i.e. 30%) lower than that which would have been agreed between unrelated parties.  Art. 13l Wet Vpb: The non-deductibility applies to participation interest expenses (both related party interest and third party interest) that are considered ‘excessive’, the deduction of which is regarded as improper use of the Wet Vpb. The excessive participation interest expenses are the interest expenses that can be allocated to the participation debt. The participation debt is determined through a mechanical, mathematical rule according to which the taxpayer is assumed to have financed its participations with equity first. Qualifying expansion investments are excluded from the participation debt formula. A threshold of EUR 750,000 of interest expenses applies.  Art. 15ad Wet Vpb: Lastly a further limitation applies on deduction of interest paid in respect of a debt claim which has been used to acquire a business in the Netherlands. The limitation applies to acquisitions and expansions of a holding that are debt financed and for which the acquirer and the target company enter into a fiscal unity for corporate income tax purposes. This limitation also covers interest on financing obtained from third parties. A threshold of EUR 1,000,000 of interest expenses applies. The provisions of art. 14a and 14b Wet Vpb are similar. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | Art. 8b Wet Vpb art. 10a Wet Vpb and art. 10b Wet Vpb apply to inter-group debt, and art. 13l Wet Vpb and art. 15ad (and art. 14a and art. 14b) Wet Vpb apply to all interest costs. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | No, thin capitalization rules have been abolished as per 1 January 2013 |
| 1. In general, how effective do you consider these rules in countering ATP? When responding, please consider Model ATP-Structures 1 – 4 and assume that C Holdco, B Hybrid and OpCo are tax resident in your MS. | Although art. 13l and art. 15ad Wet Vpb have a threshold, the rules are pretty effective (take-overs less leveraged).  The deductibility of interest expenses in the Netherlands in the structures 1 and 2 would in principle be disallowed under the interest deduction limitation provisions described under 15. |
| 1. If a loan is granted free of interest (non-arm’s length-condition) by a foreign group member company, could a debtor company resident in your MS claim any tax deduction for a hypothetical (deemed) interest cost? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo D is tax resident in your MS. Moreover, please explain whether any deemed deduction would be contingent on a corresponding adjustment in the foreign state. | In principle yes based on the arm’s length principle, however the interest deduction limitations as described under 15a could limit this deduction, e.g. under art. 10b Wet Vpb (depending on the maturity date of the loan). |
| 1. Would the benefit of such a loan compared to a normal interest-bearing loan on arm’s length conditions be taxable to the debtor company in your MS? If yes, how? | No, this would be treated as an informal capital contribution. |
| 1. Does your MS levy any withholding tax on interest payments? | No, unless interest on qualifying participating loans. In that case dividend withholding tax might be levied. |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | n/a |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | n/a |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | n/a |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | n/a |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | n/a |
| *Allowance for corporate equity* | |
| 1. Does your MS offer any tax deduction for a notional (fictitious) interest cost on the share capital of a company? If yes, please briefly explain and include any anti-avoidance provisions. In particular, can the deduction be claimed against financial income? | No. |
| 1. Does your MS offer any tax deduction for dividends declared or paid? If yes, please briefly explain. | No. However, under very specific conditions a Dutch Cooperative may deduct part of its profit (art. 9 paragraph 2 Wet Vpb). |
| *Royalty and other income from intangible property* | |
| 1. Please consider Model ATP-Structure no. 5 and assume that Company B is tax resident in your MS. Does your MS offer any preferential tax regime (compared to the standard corporate income tax) for income from patents and other intellectual property rights? If yes, please briefly explain its main scope, characteristics and any anti-avoidance provisions. In particular, can the preferential tax treatment be applied to income from patents or other IP which has not been developed by the taxpayer (company) itself? Must the company have its own substantial R&D activities? Can the preferential tax treatment be applied also to income from other taxpayers in your MS? | The Netherlands has a innovation box (in Dutch: *‘innovatiebox’*).  This innovation box is a Dutch corporate tax facility that allows taxpayers to benefit from a lower effective tax rate with respect to income derived from qualifying Intellectual Property (“qualifying IP”), developed by the tax payer. Both resident and non-resident taxpayers can benefit from this facility. The effective tax rate in the Innovation Box is 5%. The election for the application of the Innovation Box needs to be done when filing the Dutch corporate income tax return. Taxpayers can elect to apply the Innovation Box separately for each IP asset. The lower effective tax rate only applies if the costs base of the qualifying IP has been regained.  *Basis conditions*  For IP to qualify for the Innovation Box, the following cumulative conditions should be met:   1. The IP must be self-developed and must have become a business asset after 12.31.2006 (patent) or after 12.31.2007 (R&D IP); 2. A patent or an R&D declaration needs to be obtained for the IP (“R&D IP”); and, 3. In the case of a patent right: more than 30% of the anticipated income should be attributable to the patent right.   R&D IP is IP which results from technical innovative research and development conducted by or on behalf of a taxpayer and for which the taxpayer has obtained an R&D declaration from RVO NL, a Dutch government organization which operates separately from the tax administration.  By requiring that IP is developed by the tax payer itself, the Dutch innovation box prevents abuses such as described in Model ATP-structure 5. The acquired IP would not qualify for the innovation box if Company B would be resident in the Netherlands.  *Non-qualifying IP*  The Innovation Box does not apply to income derived from trademarks, logo’s and similar rights. Acquired IP does not qualify, unless the IP is further developed by the taxpayer. |
| 1. Can a company in your MS obtain R&D tax credits (typically enhanced tax deduction or tax refund) for costs incurred, e.g. in developing IP rights? | Other facilities are the so called WBSO (wage tax credit) and RDA regimes (super deduction) and the deduction at once. They work as follows.   * *Reduction in wage tax and social security contributions (‘WBSO’):* Reduction in wage tax and social security contributions towards the wage costs of employees carrying out qualifying R&D activities. For 2015 the reduction is set at 35% for the first EUR 250,000 in R&D wage costs and 14% for the remaining R&D wage costs. * *Additional deduction for certain R&D costs and expenditures (‘RDD’):* As per 2012 an additional deduction for qualifying R&D costs - other than wage costs - and R&D investments entered into force. A percentage of the costs – other than wage costs - that are directly allocable R&D activities can be deducted from the taxable profit in addition to the regular deduction. This deduction also applies to R&D costs in relation to assets that are allocated to the Innovation Box. For 2015 the additional deduction is assessed at 60% of the R&D costs. * *Deduction for IP development costs at once:* Development costs for self-developed intangible assets can be amortized at once. |
| 1. If yes to 24, |  |
| 1. Please briefly explain the requirements which have to be met, e.g. requirements for certain activity or successful development, etc. | See our answer to question 24. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | No. The RDD requires that the R&D-costs are borne by the taxpayer. The WBSO requires that the tax payer is liable to wage tax on the R&D wages. |
| 1. Can a company in your MS transfer ownership of a patent, trademark or other IP right to a foreign group member company without incurring capital gains tax? When responding, please consider Model ATP-Structure no. 5 and assume that MNE Group is tax resident in your MS. Please also assume that the IP has no significant fair market value at the time it is transferred but it becomes highly valuable shortly (1-2 years) after. | No, upon transfer of the IP, the difference between the book value and higher fair market value would be a taxable capital gain. |
| 1. If no to 26, i.e. your MS would impose tax on the disposal, |  |
| 1. Is the relevant capital gains tax rate lower than the standard rate? | In principle no, unless the innovation box regime applies to the IP. |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | No |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | No. However, accelerated depreciation lowers the book value of the IP. Because the difference between book value and fair market value is taxable, this benefit is effectively reversed upon a disposal. |
| 1. Can a ruling confirming the value of the IP be obtained? | Yes, it would be possible to conclude an APA with the Dutch tax authorities on the value of the IP (in case of a cross border transfer). A bilateral APA would also be possible. |
| *Royalty and other IP costs* | |
| 1. Is royalty paid by a company in your MS to a group member company in another MS or for utilization of IP tax deductible? | Royalty payments are fully deductible as normal business expenses, provided that the royalty payments are in line with the arm’s length principle. There are no other restrictions, for example with respect to the location of the recipient. |
| 1. If yes to 28, |  |
| 1. Is the tax deduction dependent on whether the royalty income is taxed in the hands of the IP-licensor/IP-owner? | No. |
| 1. Are there types of royalty payments which cannot be deducted? | No. |
| 1. Does your MS levy any withholding tax on royalty payments? | No. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | n/a |
| 1. Are there types of royalty payments which are not subject to withholding tax? | n/a |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | n/a |
| 1. Is the tax exemption/reduction/refund subject to any other anti-avoidance requirements, e.g. based on a test of the substance of the recipient? If yes, please explain briefly. | n/a |
| *Group taxation* | |
| 1. Does your MS allow for group taxation of local group member companies with the effect that profits and losses of different companies are set-off against each other? If yes, please briefly explain. (Please note that group taxation also includes other standard arrangements offered to replicate the benefits of group taxation, e.g. group contributions from a profitable company to a loss-making group member company). | Upon joined request, a parent company and its subsidiary or subsidiaries may be considered one entity for CIT purposes (fiscal unity). The activities and assets and liabilities of the subsidiaries are allocated to the parent company. However, the subsidiaries remain formally subject to corporate income tax (article 15(1) of Wet [Vpb](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_nl_abb_vpb?WT.z_nav=crosslinks)). Both the balance sheets and the profit and loss accounts are fiscally consolidated. Corporate income tax is imposed on the parent company.  Before the fiscal unity is approved, the following conditions must be fulfilled (article 15(1) and (3) of Wet [Vpb](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_nl_abb_vpb?WT.z_nav=crosslinks)):   1. the parent company must hold at least 95% of each class of shares and 95% of the voting rights in the subsidiary company, provided that the other shares do not entitle their holder to more than 5% of the company’s distributed and retained profits; 2. the tax years of all companies concerned must coincide. The tax year in which a subsidiary company joins a fiscal unity is considered 1 tax year for this purpose; 3. all companies involved must be resident in the Netherlands; 4. the parent company must be an [NV](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_nl_abb_nv?WT.z_nav=crosslinks), a [BV](http://online.ibfd.org.esc-web.lib.cbs.dk/linkresolver/static/cta_nl_abb_bv?WT.z_nav=crosslinks), a cooperative or mutual insurance association or an entity incorporated under the law of Aruba, the BES Islands (Bonaire, St. Eustatius and Saba), Curacao or St. Maarten, another EU Member State or a country with which the Netherlands has concluded a tax treaty containing a non-discrimination provision. The foreign entity must be comparable to an NV or a BV; 5. the subsidiary must be an NV, a BV or a foreign entity as mentioned in (5); and 6. the shares in the subsidiaries involved may not be held as inventory.   Based on a recent Decree of the Dutch Ministry of Finance, a Dutch fiscal unity could also be formed between (1) a Dutch parent company and a Dutch lower-tier subsidiary that is held through an intermediate company in another EU Member State and (2) between two Dutch sister companies held by a joint EU parent company. In the latter case, one of the Dutch sister companies should be regarded as fiscal unity ‘parent’ company. |
| 1. If yes to 32, is group taxation restricted in situations where a (holding) company has solely been inserted in connection with a leveraged acquisition of the operating company (so-called debt push-down)? When responding, please consider Model ATP-Structures no. 1 – 3 and assume that C Holdco and B Hybrid are tax resident in your MS. | No, although that Dutch tax law contains a specific interest deduction limitation provision in case of leveraged acquisitions (art. 15ad Wet Vpb). |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | Yes, art. 13a Wet Vpb applies with respect to non-qualifying participations for the Dutch participation exemption. |
| 1. If yes to 34, please briefly explain the rules and their scope. | *General rule*  All benefits arising from non-qualifying participations are taxed at the regular corporate income tax rate of 25%. In order to mitigate double taxation, a fixed amount of up to 5% of the grossed up benefits may be credited against the CIT due. That credit is not allowed if the subsidiary is (effectively) exempt from corporate income tax.  *Participations in EU subsidiaries*  Subject to certain conditions and upon request, the actual underlying foreign corporate income tax can be credited against the corporate income tax due in respect of benefits arising from participations in subsidiaries that are resident in a Member State of the European Union. A credit of up to the actual foreign corporate income tax applies to dividends only.  *Compulsory revaluation*  Participations are annually valued at fair market value if:  (i) the parent company, alone or together with an affiliated entity, owns an interest of at least 25% in the subsidiary; and  (ii) the subsidiary is not subject to tax that is reasonable according to Dutch standards; and  (iii) at least 90% of the subsidiary’s assets consists of low-taxed free portfolio investments. |
| 1. Please consider the attached Model ATP-Structures no. 1, 2 and 4 - 6. Assuming that MNE Group is tax resident in your MS, would your MS’s CFC-rules be applied to the structures? If yes, what would be the likely effects? | No assuming that more than 50% of the aggregated assets of the direct subsidiary of MNE Group do not consist of low taxed portfolio investments.  In Model ATP-Structure no. 1 art. 13a Vpb is likely to apply to the shareholding in Offshore Co.  In Model ATP-structure no. 6 art. 13a Vpb may apply to the shareholding in B1 (depending on the activities of B1). |
| *Mismatch in qualification of legal entities* | |
| 1. Does your MS’s tax qualification of a foreign legal entity (e.g. a partnership) follow that of the foreign state, or does it apply its own criteria? Please briefly explain. When responding, please consider Model ATP-Structure no. 3 and assume that MNE Group is tax resident in your MS. | No, the Netherlands apply their own criteria to qualify a foreign legal entity. The Dutch entity classification rules are laid down in a Ministerial Decree which rules apply for purposes of Dutch personal income tax, CIT and dividend withholding tax. In addition a list of foreign entities is published on the website of the Dutch revenue, with an indication as tax transparent or opaque. It has been expressed that this list is of an “indicative” nature only.  The Ministerial Decree makes a distinction between ‘corporations’ and ‘partnerships’.  Corporations are (always) classified as opaque whilst partnerships are in principle treated as transparent, unless their shares are freely transferable.  Based on the framework laid down in the Ministerial Decree, an entity is inter alia classified as a corporation (tax opaque) in case at least three of the following four relevant questions are answered in the affirmative.  a) Whether the entity is the (legal) owner of the assets.  b) Whether the members of the entity carry only liability for debts of the entity up to the amount of the capital contributed by them.  c) Whether the capital of the entity is divided into shares under civil law or has similar features.  d) Whether the shares of the entity are freely transferable.  Whether Hybrid B would be considered transparent or non-transparent from a Dutch tax perspective could not be answered as this fully depends on the answers/outcome on the aforementioned questions. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a legal entity (company) resident in your MS? If yes, please briefly explain the rules and their scope. When responding, please consider Model ATP-Structure no. 3 and assume that B Hybrid is established and tax resident in your MS. | No. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a transparent entity (partnership or similar) in your MS? If yes, please briefly explain the rules and their scope. | No. |
| *Tax residence of company* | |
| 1. Based on domestic tax rules, without the application of any tax treaty, can a company incorporated in your MS be considered non-tax resident if its management and control is situated in another state? If yes, please explain under which circumstances. | Yes, based on art. 2 paragraph 4 Wet Vpb, a company incorporated in the Netherlands remains a Dutch tax resident regardless where the company is managed and controlled. However, in case of double residence based on the tie breaker rule in almost all DTCs the company must be considered to be a resident in the state in which it is managed and controlled. |
| 1. If yes to 40, please consider Model ATP-Structure no. 6. Would the Structure work if Company B1 is incorporated in your MS but managed and controlled abroad in an offshore-state? | Yes the structure would work only if a permanent establishment of B1 in the other jurisdiction is recognised. All income of Company B1 would be allocated to the other jurisdiction and the company would file a ‘0’-CIT return in the Netherlands. |
| *Tax ruling practices* | |
| 1. Some states offer tax rulings (incl. so-called APAs) that confirm non-arm’s length-transactions or the amount of spread between interest or royalty income and cost in various international flow through-structures. As an example, please refer to Model ATP-Structure no. 1. Does your MS offer this form of tax ruling practices or APAs? | Yes (but non-arm’s length remunerations are not confirmed). |
| 1. Do your local transfer pricing-rules allow for the stripping of income from a domestic company by taking away legal ownership of functions, assets and risks? In other word, is it accepted that relatively small amounts of the group’s income is taxed in your MS on the basis of low risk, few assets held and only few functions performed in your MS? | No based on the OECD TPG. |
| 1. Can a company in your MS obtain a ruling or APA that a) provides for tax exemption of profits considered to exceed an arm’s length-income or considered to have been left to the company by its shareholders (capital contribution), or b) provides for the deduction of deemed expenses that would have been due under arm-‘s length conditions? | Yes but only with respect to option a. |
| *GAAR/SAAR* | |
| 1. Please consider Model ATP-Structures no. 1-7. Are you aware of any general or specific anti-avoidance rules or practice in your MS which could impede or counter the ATP objective of any of the structures? If yes, please describe briefly the scope of the rules/practice and how they could be applied to each of the structures. | Dutch tax law does not contain a general GAAR, but besides several specific anti-abuse provisions, the principle of ‘fraus legis’ has been introduced in case law by the Dutch Supreme Court. Fraus legis is applicable if 1) the goal of the structure and/or transaction is to achieve a tax benefit, 2) the decisive motive of the structure and/or transaction is to achieve this tax benefit and 3) this is contradictory with object and purpose of the law. |
| *Other ATP indicators* | |
| 1. Are you aware of any tax rules, tax practice or lack of tax rules (loopholes) – other than those discussed in the preceding answers - which could facilitate your MS’s role in ATP? If yes, please briefly explain. | No. |

1. The addition made by Dutch fiscal attaché to the original answer was approved by NTE with the following note: “the levy described is Dutch corporate income tax under the so-called Dutch foreign taxpayer rules and not a dividend withholding tax.” [↑](#footnote-ref-2)