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# The New Tax Arrangement between the Netherlands and Curaçao

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The new Tax Arrangement between the Netherlands and Curaçao entered into force as per January 1, 2016. The following article summarizes the benefits of this Tax Arrangement, in particular with respect to dividends and capital gains.

## I. Introduction

The new tax arrangement between the Netherlands and Curaçao (“TANC”) entered into force on January 1, 2016. The TANC replaces, with respect to Curaçao, the previous Tax Arrangement of the Kingdom (“TAK”). It complies with modern international tax standards and re-establishes taxation rules between the Netherlands and Curaçao, which became an independent country after a constitutional reform dissolved the Netherlands Antilles. Because of the relevance for the international tax practice, this article focuses on the treatment of dividends and capital gains under the TANC.

## II. Tax Treatment of Dividends

### A. Corporate Shareholders

The most important improvement of the TANC concerns the (re)introduction of a full exemption from taxation of dividends, provided that certain requirements are met. Because Curaçao does not levy a withholding tax on dividends, this provision is particularly interesting for Dutch companies owned by a qualify-

ing Curaçao company (see below). Under the TAK a rate of 8.3% applied with respect to dividends. If the requirements for the exemption in the TANC are not met, a 5% tax rate on dividends applies until December 31, 2019. This grandfathering regime applies to corporate structures in place on June 5, 2014 and requires that the Curaçao company holds a share interest of at least 25% in a Dutch company. For all other situations, a rate of 15% applies.

The dividend tax exemption applies to Curaçao companies<sup>1</sup> which beneficially hold a shareholding of at least 10% of the capital of a Dutch company and which meet at least one of the following tests:

### 1. The Direct or Indirect Publicly-Traded Company Test

The direct publicly-traded company test is met if the shares of the Curaçao company are regularly traded on a qualifying stock exchange.<sup>2</sup> The indirect publicly-traded company test is met if (i) at least 50% of the shares of the Curaçao company are directly owned by one or more companies the shares of which are regularly traded on a qualifying stock exchange and (ii) these companies reside in the Netherlands, Curaçao or a third country provided that dividend payments

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from the Source State to the third country would also be exempt under the application of a tax treaty or multilateral instrument in force between the Source State and the third country.

## 2. The Ownership Test

The ownership test is met in case Dutch company is (in)directly held for 50% or more by Dutch and/or Curaçao resident individuals.

## 3. The Headquarter Test

The headquarter test is met in case all of the following requirements are met:

- the Curaçao company provides a substantial part of the supervision over, and the management of, the group and the administration thereof or a substantial part of the financing of the group and has sufficient staff that independently exercises these functions;

- the group to which the Curaçao company belongs consists of enterprises in at least five different countries or regions generating at least 10% of the gross income of the group in each country or region;

- no more than 50% of the gross income is derived from the Netherlands; and

- the Curaçao company is not subject to a special tax regime.

## 4. The Substance Test

The substance test is met if the Curaçao company has at least three full time local qualified employees who can independently manage the affairs of the company and are authorized to do so.

## 5. The Activity Test

The activity test is met if the Curaçao corporate shareholder is actively conducting a trade or business and the dividends are received in connection with this trade or business. The management of portfolio investments for own account is not considered to be a trade or business, unless the enterprise of the company is a bank, an insurance company or broker.

## 6. The Safety Net Test

The safety net test is met if the Curaçao company receives confirmation from the competent tax authorities that (one of) the main purpose(s) of the structure is not to benefit from the dividend tax exemption. Such confirmation should be granted if (i) the shares held by the Curaçao company in the Dutch company can be allocated to a business enterprise of the Curaçao company and (ii) the Curaçao company meets certain minimum substance requirements.<sup>3</sup> This opens the possibility for multinational groups or private equity funds to structure their investments tax efficiently via a Curaçao-Netherlands holding structure, provided the appropriate level of substance is maintained.

In addition to the above, the dividend tax exemption also applies to Curaçao pension funds and Curaçao public bodies.

Note that Article 22 of the TANC contains a general anti-abuse rule (“GAAR”) based on which the benefits of the TANC (including the dividend tax exemption)

can be refused. However, it is clarified in the second paragraph of this article that the Netherlands will not invoke its GAAR with respect to a Curaçao company owning an interest in a Dutch company that qualifies for the dividend tax exemption of Article 10 of the TANC (as described above), except when it qualifies under the ownership test (i.e. in that situation, the Netherlands may invoke its GAAR, although these situations will typically not be considered as abusive).

## B. Individual Shareholders

Under the application of the TANC (and previously the TAK), dividends distributed by a Curaçao/Dutch company to an individual residing in the other State are allowed to be taxed at a rate of 15%. However, unlike the TAK, the TANC includes an exit tax clause based on which the Netherlands and Curaçao are allowed to apply their domestic personal income tax rate (i.e. the Netherlands: 25%; Curaçao: 19.5%) if:

1. the dividend is derived by a former resident of the Source State residing in the other State no later than 10 years after emigration from the Source State; insofar as
2. the tax assessment is based on a value increase of the shareholding during the period the individual resided in the Source State and there is still an amount outstanding under the relevant tax assessment.

## C. Liquidation/Repurchase of Shares

The TANC includes another important change compared to the TAK with respect to the tax treatment of benefits derived by a Curaçao/Dutch shareholder upon the liquidation of, or a repurchase of shares by a company residing in the other state. Under the TANC such benefits are explicitly qualified as dividends and therefore can no longer be treated as capital gains for Dutch tax purposes. As a consequence, these benefits will only be exempt from Dutch taxation if a Curaçao corporate shareholder qualifies for the dividend tax exemption (see above).

## III. Tax Treatment of Capital Gains of Shares

### A. Corporate Shareholders

Article 13 of the TANC, relating to capital gains, provides that the taxing right with respect to gains realized in connection with the sale of a company, is assigned to the state in which the seller is a tax resident. Hence, the sale of a Dutch company by its Curaçao parent company, should not be subject to Dutch tax. This is in particular relevant, because Dutch domestic law contains a GAAR based on which the Netherlands can tax these profits under certain circumstances. As mentioned above, based on Article 22 of the TANC the Netherlands may still be allowed to tax the gain in abusive situations, but not if the Curaçao parent company qualifies for the dividend tax exemption provided in Article 10 of the TANC (except when it is based on the ownership test).

The TAK did not limit the application of the above-mentioned anti-abuse rule, although the Dutch Minis-



try of Finance did not apply this rule in the years 2012 up to and including 2015.<sup>4</sup>

## B. Individual Shareholders

The TANC allocates the taxing rights on capital gains derived by an individual residing in the Netherlands/Curaçao holding at least 5% of the shares in a company residing in the Other State to the State of Residence of the individual. As an exception to this rule, the taxing rights are allocated to the Source State if the exit tax clause applies (see above). The TAK also included an exit tax clause for capital gains, although the collection period was only 5 years instead of 10 years.

## IV. Concluding Remarks

The TANC is based on the most recent tax treaty principles, under which tax treaty advantages are only available for companies which have a certain level of substance and nexus with the country of residence. For those cases, the TANC offers a full exemption from taxation on dividends and assigns capital gains taxation to the state where the seller is tax resident. If the applicable requirements for the dividend tax exemption are not met, a beneficial grandfathering regime may be applicable until December 31, 2019.

The tax treatment of dividends and capital gains derived by individuals residing in Netherlands/Curaçao from companies resident in the Other State remains, in most situations, unchanged. However, compared with the TAK, the TANC increases the taxing rights of the Source State in case of emigration of individuals to the Other State.

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### NOTES

<sup>1</sup> Of course, the same rules apply to Curaçao companies distributing a dividend to a Dutch company. However, because of the absence of Curaçao withholding tax, we focus on dividend payments from the Netherlands to Curaçao.

<sup>2</sup> A "qualifying stock exchange" means: every stock exchange in the EU; the Dutch Caribbean Securities Exchange; the Nasdaq; every national stock exchange of the U.S. registered with the U.S. Securities and Exchange Commission; the Mexican stock exchange Bolsa Mexicana de Valores; the Toronto Stock Exchange; the Chilean stock exchanges Bolsa de Comercio, Bolsa Electrónica de Chile and Bolsa de Corredores and every other stock exchange on which the Netherlands and Curaçao agree upon.

<sup>3</sup> The substance requirements are the same as those applicable to Dutch companies requesting an advance tax ruling.

<sup>4</sup> International fiscal announcements of 12 December 2011, IFZ. 2011-793; 21 December 2012, IFZ 2012/767; 12 December 2013, IFZ 2013/863; 15 December 2014, IZV/2014/732.