Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

Munich, 2016

National Report of the Netherlands

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01 February 2016

INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing

international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Yes, the Netherlands has signed the Hague Trust Convention and recognizes domestic and foreign trusts. However, this does not mean that the concept of trust is fully understood and accepted in practice in the Netherlands. This mainly because trusts are considered transparent from a Dutch tax perspective and the assets are allocated to the settlor. For asset protection structures, for high net worth families the most common structures include foundations instead of trusts.

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

The Netherlands recognizes private foundations. These are often used in tax planning structures for asset protection purposes. The main characteristics are that (1) foundations have full independency from the founder (the founder can be a beneficiary), (2) a board of the foundation is appointed, the family retains control and voting power and (3) the beneficiaries do not have any interest in the foundation or right of information, preventing arguments between family members and others involved in a trust/foundation structure. The main advantages of a foundation in the Netherlands are solid asset protection, effective control by the family, foundations are very flexible and without any accountability towards the beneficiaries. There is an effective exemption from Dutch tax when used by non-resident families.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

What we use for high net worth families and are open partnerships (open CV – *Commanditaire Vennootschap*) for shareholding structures and mutual funds (FGR *Fonds voor Gemene Rekening*) for structuring other assets. Characteristics are that there are no obligations to file annual accounts with the Chamber of Commerce, resulting in company results and financial data not being publicly known, or even no mentioning of the aforementioned vehicles in the Chamber of Commerce at all. The mutual fund

FGR can obtain a special tax status if collective asset management is carried out as a result of which, under conditions, a full tax exemption is available.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

The tendency has changed dramatically in the past year. In filing for approval in advance for asset protections structures, the tax inspectors indicate that they are unable to cooperate and give approval in advance on asset structuring including anonymity structures. This has everything to do with the 4th EU Anti-Money Laundering Directive ("4AMLD"). Cooperating with a structure aiming for, or just inclusive of, anonymity is considered the opposite direction of the EU legislation and tax inspectors are instructed not to cooperate. It is still possible though to get approval in advance by filing for approvals for separate parts of the structures.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

The Netherlands is known to be economically and politically stable and experienced in providing tailor made advice on asset structuring. The service providers are highly educated and Amsterdam and the Netherlands are often seen as the gateway to Europe. The Netherlands has concluded more bilateral tax treaties than any other country in the world and also in international private and public law, many agreements have been signed and treaties have been ratified. A combination of these factors makes the Netherlands internationally very attractive.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

There has been some case law on the transparency of trusts and other similar vehicles since the transparency from a tax perspective has been introduced in 2010. The tax authorities basically claim transparency and attribution to beneficiary or settlor in every case, whereas in case law it has now become clear that this depends very much on the facts.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

To trusts corporate income tax, personal income tax as well as inheritance- and gift tax can be applicable. The transfer of assets into a trust is not a taxable event. This because the trusts are transparent for tax purposes. This might be useful for tax planning purposes where the Netherlands is a temporary state of residence. Assets can be put into a trust without any taxation.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

The Netherlands has committed to several initiatives. For instance to automatically exchange tax rulings in accordance with the minimum standard of the OECD/BEPS 5 and via the ECOFIN Council who agreed to revise the Council Directive 2011/16/EU in respect of the exchange of information on tax rulings exchange which will be included in the Dutch legislation on administrative cooperation. The Netherlands signed the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of Country-by-Country reports in respect of BEPS 13 (on 27 January 2016).

In anticipation of the future regulations, the Netherlands has already agreed with Germany to spontaneously exchange tax rulings in 2015.

The Netherlands has adjusted its national legislation on basis of OECD-CRS and the Council Directive 2014/107/EU. The first automatic exchange of information will take place between participating states per 2017 in respect of 2016. Financial Institutions ("FI's") will have to gather relevant information in respect of their accountholders starting 1 January 2016 which they will need to disclose with the Dutch Tax Authorities. In basically consists of information of accountholders who have accounts in states other than the state where they are considered tax resident.

The CRS law prescribes that FIs must obtain, upon account opening and in case of changes of circumstances, all tax residencies and all Tax Identification Numbers of a client. For Preexisting Accounts, the FI only has to approach clients that have indicia of a CRS partner jurisdiction of the Netherlands.

Note that the CRS replaces the EU Savings Directive.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

The Netherlands has a IGA ("Intergovernmental Agreement") with the United States in respect of FATCA.

The Foreign Account Tax Compliance Act (FATCA) is intended to detect and deter the evasion of US tax by US persons who hide money outside the US. FATCA creates greater transparency by strengthening information reporting and compliance by providing rules around the processes of documenting, reporting and withholding on a payee These rules not only impact the financial services sector, but also affect many entities outside of the traditional financial services sector with operations both in and outside of the United States.

The legislation basically requires all Financial Institutions to identify their US clients. They will also have to disclose the identity to the Dutch Tax Authorities and the Dutch Tax Authorities will disclose this information with the IRS.

The first exchange of information on basis of the IGA took place in 2015 in respect of the year 2014.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

In February 2014, the FATF recognized that the Netherlands had made significant progress in addressing deficiencies identified in its mutual evaluation report and decided that the country should be removed from the regular follow-up process. Overall, the FATF concluded that the Netherlands has reached a satisfactory level of compliance with all of the core and key Recommendations.

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Definitely. Since the introduction of this directive, the Netherlands has been working on a national shareholders register as well. This means that by 27 June 2016, we will have two separate registers where UBO's should be administrated.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

Besides the UBO register, a Dutch shareholders register (CAHR *Centraal Aandeel Houders Register*) has been introduced. It is a register where only certain groups of people have access to, being public service institutions for supervision and enforcement purposes. This is better set up according to many Dutch specialists, than the EU UBO register where everyone who has an interest has access to,

including e.g. journalists. The Dutch shareholders register is planned to enter into force at the same time as the UBO register in June 2016.

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

The Chamber of Commerce prescribes not only the name (and address) of a sole shareholder, but also of all board members and the filing of annual accounts is an obligation. This means openness of the assets to anyone with access to the Chamber of Commerce, which is basically everyone. This is for example applicable to Private Limited Liability Companies (BV *Besloten Vennootschap*), to Public Limited Liability Companies with bearer shares (NV *Naamloze Vennootschap*) and Foundations (*Stichtingen*). Certain other vehicles do not have these requirements, either the annual accounts do not need to be published, or the vehicle is not even mentioned at all in the register of the Chamber of Commerce. Naturally, with a view on asset protection, these vehicles become more and more popular. It is in practice becoming more difficult to get approval in advance on these structures by the tax authorities.

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

In general it can be stated that the combination of commercial, tax and AML laws in the Netherlands ensure the availability of full accounting records for all relevant entities. The requirements under national tax laws ensure keeping of underlying documents by all relevant entities. Accounting records and underlying documentation must be maintained for a minimum of seven years. In addition, anti-money laundering and commercial law requirements ensure that financial institutions maintain transaction records and customer due diligence records for at least five years.

As for transparency and taxation, on basis of national tax legislation, the Dutch Tax Authorities ("DTA") could oblige the taxpayer to disclose all information which could be relevant to determine the tax position (i.e. subject to tax) of the taxpayer (resident and non-residents; individuals and companies). In this respect the DTA, could ask for specifications of income derived from other states and the taxpayer (see paragraph 2.2 for further information)

Furthermore, there are many companies which work with the DTA on basis of so-called 'horizontal monitoring'. On basis of this cooperation, the companies are transparent in all processes which could be relevant to determine the Dutch tax position, which are discussed with the DTA. In such cooperation, a company provides for an overview of the processes which at the end leads to an outcome in the companies' tax return. This type of monitoring should prevent (randomly) performed audits.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

As previously described, on basis of national tax law the DTA could request the taxpayer to provide with all relevant information to determine its tax position, but this does not necessarily imply the obligation to report the world wide transfer pricing policy unless it would seem relevant for the DTA to determine the taxpayers tax position.

As per 22 December 2015, the Dutch Senate approved a new law which entered into force 1 January 2016 containing detailed transfer pricing documentation requirements in line with Action 13 of the OECD's BEPS initiatives. This in order

to enable the DTA and other tax administrations to analyze potential transfer pricing risks that relate to calculating the tax base. These requirements include a country-by-country report, a master file and a local file. A country-by-country report applies to multinational groups with a Dutch resident parent company and a consolidated turnover of at least 750 million. The master file contains an overview of the business of the multinational group, including the general transfer pricing policy and the world wide allocation of income.

In the Netherlands it is also possible for a taxpayer to pro-actively arrange for an Advance Pricing Agreement. The Advance Pricing Agreement (APA) program allows the taxpayer and the tax authority to avoid future transfer pricing disputes by entering into a prospective agreement, generally covering at least five tax years, regarding the taxpayer's transfer prices. Such agreement could be unilateral or bilateral.

2.1.3. Does the national law currently include obligations to report tax schemes?

No

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

As stated in paragraph 2.1 the DTA first requests the taxpayer to provide with all relevant information in order to determine the taxpayers tax position. The DTA could even request a foreign shareholder (who holds 50% or more of the shares in the Dutch resident taxpayer) for information in cross-border/intercompany situations.

In case the DTA – in their opinion- do not receive sufficient information, they could request for assistance with foreign authorities in respect of companies in the Netherlands on basis of several exchange of information mechanisms such as:

- Bilateral agreements:
    - the Netherlands has an extensive network of bilateral exchange of information agreements either through double taxation conventions (DTC's) and taxation information exchange agreements (TIEA's) allowing to exchange information with some 120 jurisdictions;
    - The Netherlands has signed memoranda of understanding (MOU's) with several countries providing for exchange of information Such MOU's are based on below mentioned multilateral arrangements.

- Multilateral:
    - The Netherlands has incorporated the Directive on Mutual assistance in Tax matters (i.e. Council Directive 2011/16/EU which replaced Council Directive 77/799/EEC) in national law concerning mutual assistance by the competent authorities of EU Member States in the field of direct taxation;
    - The Netherlands is also a signatory to the OECD Convention on Mutual Administrative Assistance in Tax Matters.

For further arrangements/updates we would like to refer to paragraph 1.2.1.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

The Netherlands has incorporated the Directive 2011/16/EU in national law in the so-called International Assistance in the Levying of Taxes Act (Wet op de internationale bijstandsverlening bij de heffing van belastingen, "WIB"). This law provides for three forms of exchange of information in respect of direct taxes:

- <u>Spontaneous</u>: the Netherlands (i.e. the DTA) could provide a EU Member State or treaty partner with information about likely tax evaders if it happens to uncover such information during its own audits.
- <u>Automatic</u>: the Netherlands could automatically provide information to EU Member States in respect of residents of that Member States in respect of specific items of income
- <u>On request</u>: the Netherlands could also exchange information on request of another state (e.g. treaty partner or state which the Netherlands has another exchange of information arrangement with).

Under the WIB the DTA may only exchange information if there is an international legal obligation thereto.

Requests for information by EU Member States often are send using an EU uniform E-form which are send to a regional office of the DTA which perform a legal test if information may be exchanged (e.g. if it is not a fishing expedition and whether it has sufficient relevance). In case the regional office concludes that information may be exchanged, parties concerned are informed that information is to be exchanged. Afterwards a central office receives the information. This central office of the DTA is responsible for the actual exchange of information.

The Netherlands has committed to automatically exchange tax rulings in accordance with the minimum standard of the OECD/BEPS 5. The ECOFIN Council agreed to revise the Council Directive 2011/16/EU in respect of the automatic mandatory

exchange of information on tax rulings and consequently the Dutch national legislation on administrative cooperation will be amended accordingly.

In anticipation of the future regulations, the Netherlands has already agreed with Germany to spontaneously exchange tax rulings in 2015.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

Please see paragraph 1.2.1

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

The Dutch Ministry of Finance pointed out that the Netherlands commits to the minimum standard of BEPS Action 5 to (mandatorily) spontaneously exchange tax rulings. Recently the Directive 2011/16/EU is amended on basis of which for instance member states are obliged to mandatorily automatically exchange information in respect of tax rulings. Hence, the Netherlands is forced to include these amendments in its national legislation. There is a clear overlap between BEPS Action 5 and the amendments of Directive 2011/16/EU.

BEPS Action 12 provides for recommendations to arrange for a system which would enhance control and attack aggressive tax planning strategies by mandatory disclosure of such regimes. The Dutch Ministry of Finance stipulated that the Netherlands is confident that its current system to control and prevent such strategies is already outbalanced.

As for BEPS Action 13, per 22 December 2015, the Dutch Senate approved a new law which entered into force 1 January 2016 containing detailed transfer pricing documentation requirements in line with Action 13 of the OECD's BEPS initiatives. This in order to enable the DTA and other tax administrations to analyze potential transfer pricing risks that relate to calculating the tax base. These requirements include a country-by-country report, a master file and a local file. A country-by-country report applies to multinational groups with a Dutch resident parent company and a consolidated turnover of at least 750 million. The master file contains an overview of the business of the multinational group, including the general transfer pricing policy and the world wide allocation of income.