

The Antilles route is back!

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In spite of efforts by the OECD and the EU to fight the erosion of countries' tax bases, the Netherlands and Curaçao have announced steps to strengthen their tax avoidance industry. In the new tax arrangement between the two countries that was sent to the Dutch Parliament on June 10 it is proposed to introduce a 0% dividend withholding tax rate on distributions of profits by Dutch subsidiaries to their Curaçao parent companies. As of 2015, the new arrangement will replace the current tax arrangement of the Kingdom that provides for a 8.3% withholding tax on dividends. Under the new tax arrangement the 0% dividend withholding tax rate will apply provided that the Curaçao parent company is a "qualifying entity" that holds at least 10% of the shares in its Dutch subsidiary. A Curaçao parent company is a qualifying entity if the Dutch tax authorities determine upon request that obtaining the 0% rate on dividends is not one of the main purposes of incorporating the Curaçao parent company. According to the memorandum of explanation to the new tax arrangement this is considered to be the case if two conditions are met. First the participation in the Dutch subsidiary must form part of the business assets of the Curaçao parent company. Secondly the Curaçao parent company must meet the minimum substance requirements that are listed in an annex to a Decree on the Dutch tax ruling practice. This annex may be considered an international tax planning manual.

The introduction of the 0% dividend withholding tax rate in the new tax arrangement increases the risk of abuse by facilitating the use of Curaçao and Dutch letterbox companies aimed at securing the relief from tax provided for in double tax treaties between the Netherlands and third countries. This would be the case, for example, if a company that is a resident of a third state acts through a Curaçao-Dutch holding company structure essentially to obtain treaty benefits that would not be available

directly. In this structure a company that is a resident of a third state sets up a Curacao company which in turn sets up a Dutch company that acquires participations in other group companies that are resident in other third states. The main purpose of this structure is to obtain the benefit of the limitation applicable to the third country withholding tax on dividends by the participations to the Dutch company under the tax treaties between the Netherlands and other third states. The redistribution of the dividends by the Dutch company to its Curaçao parent company will be exempt from Dutch dividend withholding tax under the new tax arrangement between the Netherlands and Curaçao. The subsequent redistribution of the dividends by the Curaçao company to the third state topholding will not be subject to tax as Curaçao does not have a withholding tax on dividends. The result of this is that the third state topholding indirectly gains access to the benefits of the tax treaties between the Netherlands and other third states. This practice is generally referred to as treaty shopping.

The introduction of the 0% dividend withholding tax rate in the new tax arrangement is striking, as an older version of the tax arrangement of the Kingdom provided for an exemption from withholding tax on dividend distributions by Dutch subsidiaries to their parent companies in the Antilles (of which Curaçao formed a part). The exemption was abolished in 1985 as states that had a tax treaty with the Netherlands opposed it because the exemption enabled treaty shopping. In Parliament the former Undersecretary of Finance Koning admitted that as a result of the exemption a tax treaty with the Netherlands could be considered a tax treaty with the rest of the world. Unfortunately the memorandum of explanation to the new tax arrangement does not offer a justification of the reintroduction of the 0% withholding tax rate. I would recommend that the current Undersecretary of Finance corrects this omission.