What about CV-BV structures and state aid?
Published in Leiden Law Blog April 20, 2015
http://leidenlawblog.nl/articles/what-about-cv-bv-structures-and-state-aid
J. Vleggeert, Associate Professor at the Institute of Tax Law of the University of Leiden
j.vleggeert@law.leidenuniv.nl

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Posted on April 20, 2015 by Jan Vleggeert in Tax Law and Economics , 3

There has been much discussion about tax planning involving the Netherlands recently. One structure which has not received sufficient attention, is the so-called “CV-BV” structure. This is unfortunate, as there are serious concerns regarding this structure in the light of the EU State aid rules. Here’s why.

How does the structure work?

A CV-BV structure is used by many (US) multinationals to avoid tax on their non-US profits. A US multinational sets up a so-called “closed” Dutch limited partnership (CV). Two US resident subsidiaries of the US multinational participate as partners in CV. The CV holds all the shares in a Dutch operating company (BV). The BV typically acts as a holding company for (part of) the non-US subsidiaries of the multinational. The earnings of these subsidiaries are channelled via BV to CV as distributions of dividend or payments of interest and royalties. CV is not taxed on this income because CV is subject to neither Dutch nor US corporate income tax due to a mismatch in the classification of CV.

According to Dutch tax law, CV is a transparent entity and therefore not liable to Dutch corporate income tax. This means that the income of CV is not taxed by the Netherlands at the level of CV. However, due to the US check-the-box rules, CV is considered non-transparent for US tax purposes. Due to that mismatch in the classification of CV, the CV is not liable to US corporate income tax either. As regards the tax position of the partners in CV, taxation in the US can be deferred indefinitely as long as none of the profit is repatriated to the US but is reinvested in the non-US subsidiaries instead. In practice this scenario is relatively common.

But what about dividend withholding tax?

One question which hasn't yet been addressed, is the treatment of dividends distributed by BV. Under the Dutch dividend withholding tax act, the US partners in the Dutch limited partnership should be subject to 15% dividend withholding tax on dividends distributed by BV. This charge is not mitigated by the tax treaty, due to a special provision (Article 24, paragraph 4 of the treaty also referred to as the "hybrid entity provision"). However, in a Decree of July 6, 2005, the Dutch State -Secretary of Finance announced that the aforementioned rule would not be applied in a case such as the CV-BV structure, with the condition that CV participates in a BV that performs substantial activities in or via the Netherlands. This last point will be judged by the Dutch authorities. The Decree only applies in relation to the treaty with US, and not to similar provisions in other Dutch tax treaties. Providing a number of requirements are met, the upshot is that the US partners would not be subject to Dutch dividend withholding tax.

The CV-BV structure is an opportunity unique to the tax treaty between the Netherlands and the US. Why does the Netherlands apparently only seek to benefit US situations? And how does this fit with the ongoing debate on fiscal State aid? As I see it, there is a serious risk that CV-BV structures lead to a selective advantage for US multinationals. How does this relate to the European Commission's investigation into for example Starbucks? I think we should be told!