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THE DUTCH FOUNDATION

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I Introduction

The Dutch foundation (stichting) is primarily governed by the Dutch Civil Code in Book 2: 285-304. The foundation is an entity with legal personality not owned by anyone. The foundation is immediately created - without prior Dutch central or local government approval being required - and immediately acquires full legal personality by its Dutch notarial deed of formation. The promoter can be anyone of age having legal capacity. The deed of formation establishes the formation and the articles secondarily governing its activities and its first director(s). The articles must be in Dutch. There may also be bylaws which may be in another language and do not need to be laid down in a notarial deed. A foundation may serve a charitable ²or another, even a commercial, purpose. Commercial activities within the objects clause will in principle be taxed with corporate income tax. The law does not allow distributions to the promoter or directors or anyone except for charitable purposes. We will see below with the Stak foundation in IV how one deals with this latter aspect in practice. The director(s), with a minimum of at least one, administer and represent the foundation. Pursuant to article 2:289 of the Civil Code the foundation will be registered with the Dutch Traderegister. The statutes need to be filed there also. The bylaws need not to be filed there. Being a legal person, a foundation may open bank accounts. There is no obligation for auditing, filing tax returns. However, if a foundation has a turnover of 4.4 million a year or more, during two subsequent book years, filing an annual account with the Trade register is required.

II Some reasons to opt for the Netherlands

We distinguish between opting for the Netherlands or opting for other jurisdictions. The Netherlands is a high-tech country, has a strategic location and is considered the or one of the main entry ports to Western Europe. It has a clear international business environment. It is a stable country with a good legal system. It has a favourable tax regime, especially for holding, financing and licensing. The Netherlands have an

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² The Dutch tax authorities may declare a foundation with a charitable purpose is an ANBI, an "institution for general benefit" with gift and succession tax benefits.

extensive network of bilateral double tax treaties. It has the participation exemption, exempting profits received from qualifying subsidiaries. Profits, if taxed, are taxed at a corporate income tax rate of 25% (profits below EUR 200,000 are subject to 20%). There is no withholding tax on outgoing interest and royalties. The dividend withholding tax rate of 15% may be reduced under certain conditions to even zero under a double tax treaty. The Netherlands also have an extensive network of bilateral investment protection treaties (BIT's). Dutch BIT's are a factor one should also take into account when considering setting up an entity in the Netherlands.

III Some reasons to opt for a Dutch foundation

Within the Dutch jurisdiction we distinguish between the Stichting and other instruments. The Stichting instrument is extremely flexible compared with the other - also rather flexible - instruments of Dutch corporate law, such as the BV, the new Flex BV, the NV, the Dutch co-op and the Dutch Limited partnership. Secondly, its formation and management costs are usually more reasonable. Thirdly, it provides equal or even more privacy than the other instruments do and it is very well suited for holding activities, as will be- come clear in IV below. It is not subject to any CFC rules.³ It can be used as an almost ideal instrument of asset protection and tax planning. As mentioned, only if the foundation is deemed by the Dutch Tax Authorities to have a business, will it be taxed with Dutch corporate income tax. It is considered a Dutch tax resident under tax treaties. A Dutch tax residence certificate may be issued. If one combines it with a Dutch BV which is possible as explained below, there is no dividend withholding tax on dividend distributions (no tax treaty required). Tax consolidation is possible between a Dutch foundation and a Dutch BV. Dividends received by any capital gains realised by a Dutch intermediate BV/ Dutch Foundation combination should be exempt from Dutch corporate income tax.

IV The Dutch Stak foundation

The Stak foundation is a species of foundation holding investments or shares (shares) in a company (BV or any other) as legal owner, while the economic interest in these shares lies with another. The purpose of the Dutch Stak construction is to separate the economic ownership of the shares from the legal ownership. How does it work? The Stak Foundation needs to become owner of the shares. The Stak foundation therefore enters into an agreement with the legal owner (s) of such shares, stipulating that the shares will be transferred into the legal ownership of the Stak foundation to administer these shares for the benefit of the transferor and against the simultaneous issuance of – abstract - depository receipts (also called certificates) by the Stak foundation. This is the obligatory agreement. This obligatory agreement has to be followed under Dutch law by a transfer of the legal ownership of the shares, by Dutch notarial deed if the shares are shares in a Dutch BV. Finally, the administration terms and conditions are also laid down in a deed. There are therefore three deeds. The transactions are then also recorded in the share register of the BV and the register of depository receipts held by the Stak. The details of the depository receipt holders are not made public. The foundation is registered in the traderegister of the BV as sole owner of the BV shares where the BV has only one shareholder. The Stak foundation has become the legal owner of the shares and will exercise the voting rights while the depository receipt holders will receive the dividends.

V Dutch taxation of the Stak foundation

Holding portfolio investments or shares in a holding is not a business activity. The Stak is deemed transparent for Dutch tax purposes. The Stak is therefore not subject to Dutch corporate income tax. Any profits or capital gains will be taxed at the level of the beneficiaries' country(ies) of residence. Assuming the depository receipt holders are not resident and do not trade or conduct a business or have a permanent establishment or permanent representative in the Netherlands and the investment is not located in the Netherlands, there will be no Dutch corporate income tax or other tax liability.

³ CFC regimes eliminate the deferral of income earned by a CFC. They tax residents currently on their proportionate share of a CFC's income.

VI Conclusions

A Dutch foundation is a very flexible instrument. By issuing depositary receipts through a Stak foundation, voting and economic rights become separated. The Stak foundation becomes an asset protection vehicle, limits disclosure of ownership, functions as an inheritance planning vehicle, etc.

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