



# NETHERLANDS

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## LIST OF ABBREVIATIONS

<b>Agreement</b>	Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments
<b>Awb</b>	<i>Algemene wet bestuursrecht</i> (General administrative law)
<b>AWR</b>	<i>Algemene wet inzake Rijksbelastingen</i> (General Tax Code)
<b>BNB</b>	<i>Beslissingen Nederlandse Belastingrechtspraak</i> (Magazine on tax case law)
<b>BRV</b>	<i>Wet op de belastingen van rechtsverkeer</i> (Law on the taxation of certain legal transactions)
<b>BW</b>	<i>Burgerlijk Wetboek</i> (Civil Law Act)
<b>Directive</b>	Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States
<b>Div. Bel.</b>	<i>Dividendbelasting</i> (Dividend Withholding Tax Act)
<b>HR</b>	<i>Hoge Raad</i> (Supreme Court)
<b>Merger Directive</b>	Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>OECD MC</b>	OECD Model Tax Convention 2003
<b>Parent-Subsidiary Directive</b>	Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
<b>Savings Directive</b>	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
<b>Uitv. Besl. IB</b>	<i>Uitvoeringsbesluit wet op de inkomstenbelasting 2001</i> (Implementing Decree to the Income Tax Act 2001)
<b>Vpb</b>	<i>Wet op de vennootschapsbelasting 1969</i> (Corporate Income Tax Act 1969)
<b>VAWB</b>	<i>Voorschrift algemene wet bestuursrecht</i> (Decree to general administrative law)



## **LIST OF LEGAL REFERENCES**

### *Laws*

- Law of 18 December 2003, published in the Official Gazette 2003, no. 529.
- Besluit no. CPP2005/2215M van 6 december betreffende de vrijstellingsprocedure dividendbelasting onder het Belastingverdrag tussen Nederland en Zwitserland en de overeenkomst tussen de Europese Gemeenschap en Zwitserland.

### *Parliamentary Documents*

- Handelingen Tweede en Eerste Kamer der Staten-Generaal bij wetsvoorstel 29.034, vergaderjaar 2002-2003 en 2003-2004.

### *Case law*

- Netherlands Supreme Court, HR, 20 September 1995, no. 29.737, published in BNB 1996/5.
- Netherlands Supreme Court, HR, 27 January 1988, no. 23.919. published in BNB 1988/217.

## PART I. IMPLEMENTATION OF THE DIRECTIVE

### 1. INTRODUCTION

#### 1.1. GENERAL INFORMATION ON THE IMPLEMENTATION OF THE DIRECTIVE

The Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States (the "Directive") was implemented in the Netherlands by the law of 18 December 2003.

As the Netherlands does not levy a withholding tax on interest and royalties, most of the provisions of the Directive did not have to be implemented. As a result, only two specific provisions in domestic law were amended to implement the Directive. These concerned a provision on the avoidance of dual residence of companies and the corporate income tax provision on debt-claims, which a foreign company has on a Netherlands company in which it holds a substantial shareholding.

#### 1.2. TAX TREATMENT OF INTEREST AND ROYALTY PAYMENTS UNDER GENERAL TAX LAW

##### 1.2.1. Domestic rules

###### *a. Tax treatment at the level of the paying company*

###### Deduction of interest and royalty payments

In general, interest payments on loans, bonds, debentures and other debts of the company are fully deductible as normal business expenses. Case law and specific legal provisions, however, deny the deduction of interest in a number of situations. The Supreme Court has ruled that a deduction of interest is not allowed if the loan is granted under such conditions that the loan is deemed to be an informal capital contribution for tax purposes, i.e. the loan is granted under such conditions that it constitutes a contribution of capital for tax purposes, for example, because the borrowing company is loss-making (HR 27 January 1988).

Interest is not deductible if the loan can be contested under the *just levy procedure* or the *fraus legis doctrine* because the construction is artificial. If, however, the interest is subject to sufficient (compensatory) taxation in the hands of the recipient, the interest remains deductible.

Furthermore, interest is not deductible if the interest constitutes a hidden profit distribution in view of an excessive interest rate.

Under the *just levy (richtige heffing)* procedure the legal act in dispute may be ignored for tax purposes (Art. 31 et seq. AWR). This procedure is subject to prior approval by the Ministry of Finance and is currently not used.

The abuse of law (*fraus legis*) doctrine is not laid down in tax law but is an interpretation method developed in case law. Under this doctrine, the spirit of the law is decisive, rather than the exact wording. The transaction in dispute may be converted to the closest equivalent, which does not give rise to an abuse of law.

In the following situations, it has been laid down in tax law that interest is not deductible:

- A deduction of interest is not allowed for interest paid on loans that are deemed to be equity of the debtor, i.e. participation loans. The provision applies in the following situations (Art. 10(1)(d) and (2) Vpb):
  - a loan with no fixed maturity or a maturity of more than 10 years bears a profit-sharing interest based on the profit or distribution of profit of the debtor or a related company;
  - a hybrid loan with no fixed maturity or a maturity of more than 10 years bears (a) partly a profit-sharing interest based on the profit or the distribution of profit of the debtor or a related company and (b) partly interest at a fixed rate less than half the market rate for loans bearing non-profit-sharing interest; or
  - a subordinated loan with no fixed maturity or a maturity of more than 50 years bears an interest depending on the distribution of profits by the debtor or a related company.
- Furthermore, deduction is denied for interest, including costs and currency exchange results, incurred in respect of loans resulting from unpaid dividends, capital contributions and capital repayments (Art. 10a(1) Vpb).
- Finally, deduction of interest, including costs and currency exchange losses, is also denied if a related party grants a loan to the company with respect to (Art. 10a(2) Vpb):
  - profit distributions, repayment of capital or an instalment of a debt claim constituting equity to a related company or related individual;
  - the acquisition of, or a capital contribution for shares, profit shares or similar rights in a related company and the acquisition of a debt claim on a related company constituting equity for the debtor, except if the ultimate ownership or voting rights in the company change or a company within a group is transferred against a debt; or
  - the contribution of capital or other appropriation of funds, whether direct or indirect, by the company or resident related party to the lending company.

The non-deductibility of interest on a related party loan applies in the following situations (Art.10a(4) CITA):

- company A holds an interest of at least 33.33% of the capital in company B;
- company B holds an interest of at least 33.33% of the capital of company A; or
- company C holds an interest of at least 33.33% of the capital of both companies A and B.

However, the provisions restricting the deduction of interest do not apply if the company paying the interest can substantiate that the acknowledgement of debt is mainly based on sound business reasons or the interest is subject to sufficient compensatory levy in the hands of the recipient (Art.10a(1) and (3) Vpb and HR 20 September 1995).

Royalty payments are not deductible if they constitute a hidden profit distribution or conflict the arm's length principle.

#### Thin capitalization rules

As from 1 January 2004, interest paid in respect to excessive debt is generally not deductible (Art. 10d(1) CITA). However, the thin capitalization provisions are only applicable to interest paid to related companies belonging to the same group. In this respect, companies are considered to be related and to form a group if they are organizationally related (Art. 10d(2) Vpb; Art. 2:24b BW).

The maximum amount of interest, which would not be deductible under these provisions, is limited to the amount of interest paid to related companies reduced by the amount of interest received from related companies (Art. 10d(3) Vpb).

Excessive debt is the part of the annual average debt, which exceeds three times the annual average equity of the company. The interest is not deductible in so far as it exceeds EUR

500,000. Debt is taken into account insofar it exceeds outstanding loans and the equity does not include reserves and provisions (Art. 10d(4) Vpb).

*b. Tax treatment at the level of the beneficiary company*

Interest income derived by resident companies is subject to corporate income tax in the normal manner. As a general rule, interest paid to resident companies is not subject to withholding tax.

Royalties received are generally treated as ordinary business income and not subject to withholding tax.

The Netherlands does not levy a withholding tax on regular outbound interest and royalties.

*c. Transfer pricing*

Transactions between related parties must be in accordance with the arm's length principle (Art. 8b Vpb). If the arm's length principle is not met the profits will be readjusted, unless the company making the transfer proves that the transaction was based on sound business reasons, for example to protect a market position.

Examples of hidden profit distributions are the following transactions:

- increased or reduced buying or selling prices;
- loans made to shareholders either free of interest or at an unreasonably low rate of interest, or loans given without the intention of repayment;
- loans from shareholders at an unreasonably high rate of interest; and
- loans to shareholders at an unreasonably low rate of interest.

Adjustments are made by reintegrating the transferred amounts to the taxable base of the paying company. The adjustment is based on the data provided by that company or, if no such data are available, on comparable market transactions. The transferred amounts in these situations are generally treated as a hidden profit distribution, which are not deductible for the payer and are taxable in the hands of the recipient.

Under a specific arm's length provision, interest-free loans or loans bearing a non-arm's length interest rate are considered to be profit-sharing loans if they are granted by a company participating directly or indirectly in the management, control or capital of the debtor or the same persons participate directly or indirectly in the management, control or capital of both companies (Art. 10(4) Vpb). In such case, the debt claim is deemed to constitute equity of the debtor.

The tax authorities may request information regarding transactions with affiliated non-resident companies, the transfer pricing method used by the company, the activities of the foreign company and its tax regime. In order to avoid discussions with the tax authorities regarding transfer pricing, companies may request an advance pricing agreement from the tax authorities.

*d. Constructive dividends*

Interest and royalty payments, made by a Netherlands company or a Netherlands permanent establishment of a foreign company to a related resident or non-resident company, which are not at arm's length, may be re-characterized as a hidden profit distribution or constructive dividend (*verkapt dividend*). The constructive dividend is that part of the benefit passed on by the company, which is deemed to be excessive. Constructive dividends are treated as dividend distributions in the hands of the receiving shareholder. This means that, in the case of non-

resident corporate shareholders, the distribution is subject to dividend withholding tax, unless the requirements of the EC Parent-Subsidiary Directive are met.

At the level of the distributing company the regular or constructive distributions are not deductible.

In the reverse case (e.g. a company sells goods to its shareholder for an excessively high price), the benefit may not be taxable in the hands of the company and not deductible for the shareholder. Such benefit is deemed to be an informal capital contribution made by the shareholder to the company, subject to capital duty at a rate of 0.55% (Art. 33 BRV). The capital tax will be abolished as from 1 January 2006.

### **1.2.1. Treaties**

The Netherlands has tax treaties with all other EU Member States except Cyprus (see Annex). All treaties cover interest and royalties. As the Netherlands does not levy a withholding tax on interest and royalties, the Netherlands treaty policy is to include zero or very low withholding tax rates in its tax treaties.

#### *a. Interest*

The definition of interest in many of the Netherlands' tax treaties follows the OECD MC. However, in the Netherlands tax treaty policy interest is defined as:

"Income from debt-claims of every kind, whether or not secured by mortgage but not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article."

The withholding tax rate for interest is often 0%. Exceptions are the treaties with Greece, Italy, Latvia, Lithuania, Malta, Portugal and Spain where the withholding tax in most cases is 10%.

Furthermore, it must be noted that, except for the treaties between the Netherlands and Austria, Belgium, France and Ireland, respectively, income from profit-sharing bonds is classified as a dividend.

Avoidance of double taxation is achieved via a credit method.

#### *b. Royalties*

The definition of royalties is not always the same under Netherlands tax treaties but generally follows the OECD MC and the Netherlands tax treaty policy, in which the term "royalties" is defined as:

"Payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."

The withholding tax rate for royalties is often 0% or 5%. However, for royalties the rate is generally 6% under the treaty with Spain, 7% under the treaty with Greece and 10% under the treaties with Latvia, Lithuania and Malta.



The treaties with Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Spain, Sweden and the United Kingdom provide for exclusive taxation in the state of residence.

Avoidance of double taxation is achieved via a credit method.

*c. Conclusion*

The definition of interest and royalties under a tax treaty may differ from that of the Directive. The tax treaties with Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Slovak Republic, Slovenia, Sweden and United Kingdom provide for exclusive taxation in the residence state in respect of interest. The treaties with Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Spain, Sweden and United Kingdom provide for exclusive taxation in the state of residence in respect of royalties.

## 2. SCOPE

### 2.1. PAYMENTS

#### 2.1.1. Concept of interest

##### *a. Definition*

As there is no withholding tax on interest, the Netherlands did not implement the definition of the Directive. A definition of interest is only included in the Implementing Decree to the Personal Income Tax Act, in which it is defined as a compensation agreed between a money lender and a borrower for providing a loan (Art. 22(3) Uitt. Besl. IB), which does not apply for the Corporate Income tax. Interest payments on participation loans and profit sharing bonds are reclassified as dividends and subject to dividend withholding tax, levied at the general rate of 25% (Art. 10(1)(d) Vpb and Art. 3(1)(f) of the Div. Bel.), unless reduced by a tax treaty or the Parent-Subsidiary Directive. The same applies to interest, which is treated as dividend under the Netherlands thin capitalization rules.

This reclassification seems compatible with the Directive because Art. 4(1)(a) authorizes the Member States to deny the benefits of the Directive to payments which under the laws of the source state are treated as a profit distribution. Furthermore, it must be noted that no dividend withholding tax is withheld with respect to interest payments on a participation loan provided by a foreign parent company to its Netherlands subsidiary, if the requirements of the Parent-Subsidiary Directive are met (Art. 4a Div. Bel.).

In its tax treaties the Netherlands usually follows the definition of the OECD MC. However, with respect to the treaties concluded between the Netherlands and the other EU Member States, it must be noted that, except for the treaties with Austria, Belgium, France and Ireland, income from profit-sharing bonds is classified as a dividend.

##### *b. Exclusion of interest as profit distribution or conflicting arm's length (Art. 4(1)(a) and Art. 4(2)).*

Non-deductible interest is treated as a constructive distribution, either under thin capitalization rules (see introduction, 1.2.1 *a. Tax treatment at the level of the paying company*) or the transfer pricing rules (see introduction, 1.2.1. *c. Transfer pricing*). Disallowed interest is re-characterized as a dividend and subject to the 25% dividend withholding tax. This rate may be reduced under the applicable tax treaty. The dividend is exempt if the requirements of the Parent-Subsidiary Directive are met.

#### 2.1.2. Concept of royalties

##### *a. Definition*

The Netherlands tax law does not provide for a definition of royalties. As the Netherlands does not levy a withholding tax on royalties, the definition of the Directive was not implemented into Netherlands law.

In its tax treaties the Netherlands usually follows the definition of the OECD MC, in which the term "royalties" is defined as "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience".



*b. Exclusion of royalties as profit distribution or conflicting arm's length (Art. 4(1)(a) and Art. 4(2).*

Excessive royalties that conflict the arm's length principle fall under the general Netherlands transfer pricing rules (see introduction, 1.2.1, *c. Transfer pricing*). In certain cases excessive royalties may be reclassified as a constructive dividend (see introduction 1.2.1. *d. Constructive dividend rules*).

### 3. SPECIFIC AMENDMENTS TO NETHERLANDS LAW

Although the Netherlands does not levy withholding tax on interest and royalty payments, there is one specific situation where the Netherlands tax legislation provides for taxation by assessment by the Netherlands of interest payments to foreign companies.

#### 3.1. INTEREST ON DEBT-CLAIMS OF A NON-RESIDENT SUBSTANTIAL SHAREHOLDER

Art. 1 of the Directive requires that interest and royalty payments are not subject to tax levied by withholding or assessment. Therefore, an amendment was included in the Corporate Income Tax Act (Art. 17a (2) Vpb).

Under the Netherlands Corporate Income Tax Act, a foreign company, which owns a substantial shareholding (i.e. a shareholding of at least 5%) in a Dutch company is taxed as a non-resident taxpayer, with respect to income from such substantial shareholding, unless the substantial shareholding is part of its business property (Art. 17(3) Vpb). The foreign company is also taxed as a non-resident taxpayer with respect to interest payments on a debt claim, which it has on the Dutch company in which it owns a substantial shareholding (Art. 17a (1) (c) Vpb). Art. 17a (1) Vpb also applies to mutual funds and cooperatives. Although mutual funds and cooperatives are not listed in Annex A of the Directive, the exemption from tax as provided for in Art. 17a (2) Vpb also applies to interest paid by mutual funds and cooperatives. Mutual funds and cooperatives are not excluded from the application of the exemption, by taking this decision also anticipating to a potential future extension of the list companies in the Annex to the Directive.

If the beneficial owner of the interest is a non-resident company established in another Member State this levy would be incompatible with Art. 1 of the Directive.

Therefore, the provision in Art. 17a Vpb. has been extended with a second paragraph, which provides that interest payments on debt claims in such situations are tax exempt if the following cumulative conditions are met:

- the owner is a company which has a legal form included in the annex of the Directive;
- the owner is a company related with the Dutch company under the criteria of the Directive;
- the company owning the debt-claim is subject to one of the taxes mentioned in Art. 3 (a) (iii) of the Directive, without being exempt, in its state of residence;
- the company owning the debt-claim is not resident outside the EU based on a tax treaty concluded with a third state; and
- the debt-claim is not attributed to the property of a permanent establishment established outside the EU.

The parliamentary documents indicate that the interpretation of the term permanent establishment will be governed by case law of the European Court of Justice (Parliamentary Document 29 034, no. 3 at 4).

It must be noted that pursuant to bilateral tax treaties, in many cases, the Netherlands cannot tax the interest on such debt-claims or only to a limited extent.

#### 3.2. COMPANIES

The Netherlands only levies tax by assessment on interest payments as described in 3.1. (*Interest on debt-claims of a non-resident substantial shareholder*). The provision in Art. 17a Vpb. is extended with a second paragraph, which, amongst others, provides that interest

payments on debt claims in such situations are tax exempt if the owner is a company which has a legal form included in the annex of the Directive.

### **3.3. RESIDENCE REQUIREMENT (ART. 3(A)(II))**

The Netherlands only levies tax by assessment on interest payments as described in 3.1. (*Interest on debt-claims of a non-resident substantial shareholder*). In order to avoid situations of dual residence a reference to the Directive is included in the General Tax Act (Art. 4(3) AWR). Under this provision a company is for purposes of the Interest and Royalties Directive deemed to be resident in the foreign country where it is resident based on its domestic law.

### **3.4. SUBJECT-TO-TAX REQUIREMENT (ART. 3(A)(III))**

The Netherlands only levies tax by assessment on interest payments as described in 3.1. (*Interest on debt-claims of a non-resident substantial shareholder*). Therefore, the provision in Art. 17a Vpb. is extended with a second paragraph, which, amongst others, provides that interest payments on debt-claims in such situations are tax exempt if the company is subject to tax, without being exempt, in its state of residence.

### **3.5. ASSOCIATED COMPANY (ART. 3(B))**

The Netherlands only levies tax by assessment on interest payments as described in 3.1. (*Interest on debt-claims of a non-resident substantial shareholder*). Therefore, the provision in Art. 17a Vpb. is extended with a second paragraph, which, amongst others, provides that interest payments on debt-claims in such situations are tax exempt if:

- a) the company owning the debt-claim has a direct minimum holding of 25% in the capital of the Dutch company, or
- b) the Dutch company has a direct minimum holding of 25% in the capital of the company owning the debt-claim, or
- c) a third company has a direct minimum holding of 25% both in the capital of the company owning the debt-claim and in the capital of the Dutch company.

As already indicated, the Netherlands only levies tax that has to be exempted pursuant to the Directive in situations where the foreign company owns a substantial shareholding in the Dutch company, and the foreign company has a debt-claim on the Dutch company. Therefore, the relationship described under b above is not expected to occur in practice, also pursuant to the Dutch Civil Code, because that would result in the fact that a subsidiary has a substantial shareholding in its parent company.

### **3.6. BENEFICIAL OWNERSHIP (ART. 1(4))**

The Netherlands only levies tax by assessment on interest payments as described in 3.1. (*Interest on debt-claims of a non-resident substantial shareholder*). No special provision has been implemented in view of the Directive with respect to a definition of beneficial ownership.

## **3.7 PERMANENT ESTABLISHMENTS**

### **3.7.1. Definition (Art. 3(c))**

The definitions of permanent establishment in Art. 3(c) of the Directive and under Netherlands domestic law is based on Art. 5 OECD MC. In view of the application of Art. 17a Vpb, the term

permanent establishment has to be interpreted in accordance with the Directive. Consequently, the interpretation of the term will be governed by case law of the European Court of Justice.

**3.7.2. Application of source rules (Art. 1(2))**

No relevance in the context of Netherlands law.

**3.7.3. 'Tax-deductible expense' requirement (Art. 1(3))**

No relevance in the context of Netherlands law.

**3.7.4. Beneficial ownership (Art. 1(5))**

No special provision has been implemented in view of the Directive with respect to a definition of beneficial ownership. However, according to Parliamentary proceedings, for the application of the Dutch Corporate Income Tax Act 1969, the debt-claim, right, use or information in connection with which the interest or royalty is paid is effectively connected to a permanent establishment if the debt-claim, right, use or information is attributable to the permanent establishment located in the Netherlands.

**3.7.5. Permanent establishment in a third country (Art. 1(8))**

Art. 17a Vpb specifically indicates that the debt-claim on the Dutch company will not be attributable to a permanent establishment which the owner has in a country outside the EU.

## 4. PROCEDURE

In the situation as applicable under Art. 17a Vpb, the foreign company, which owns a substantial shareholding (i.e. a shareholding of at least 5%) in a Dutch company is taxed as a non-resident taxpayer, with respect to income from such substantial shareholding. Consequently, the foreign company will have to file a corporate income tax return in the Netherlands, in which the income from the debt-claim is reported.

However, by implementing the Directive, Art. 17a (2) specifically provides for a tax exemption with respect to interest income derived by the EU-shareholder of a substantial shareholding of at least 25% in the Dutch company. The conditions for the application of the exemption have been described under sections 3.2 up to and including 3.7.

### 4.1. MINIMUM HOLDING PERIOD (ART. 1(10))

#### 4.1.1. General

The Netherlands has not made use of the possibility to require a minimum holding period.

### 4.2. ATTESTATION (ART. 1(11) AND 1(13))

Due to the fact that the non-resident shareholder has to file a corporate income tax return, an attestation is not relevant in the context of Netherlands law.

### 4.3. DECISION ON APPLICATION OF THE RELIEF ART. 1(12)

A company or its representative (e.g. tax consultant) may lodge an objection with the tax inspector within 6 weeks after the date of the assessment (Arts. 22j AWR, 23 AWR and 6:7 Awb). The objection must state the grounds on which the assessment should be revised, but it is allowed to file a pro forma objection (i.e. a mere statement that the company objects to the assessment, without stating the grounds on which the objection is based). The tax inspector will request the company to send an elaboration on the objection within 4 weeks. If the company does not respond, the tax inspector sends a reminder setting an additional term of 2 weeks. If the company fails to meet this last term, the objection is generally declared non-admissible (Art. 6.1.1. VAWB).

The company lodging an objection has the right to request a hearing before a decision is rendered. In general, the hearing is before a tax inspector other than the one dealing with the objection (Art. 7:5 Awb).

The tax inspector must render his written decision within 1 year after receiving the objection (Art. 25 AWR). Art. 6.2.7. of the VAWB, however, prescribes that a decision must be made within 6 to 10 weeks for regular cases and allows for a period of 1 year only in extraordinary circumstances.

If the company is not satisfied with the decision of the tax inspector concerning its objection to the assessment, an appeal may be lodged with a lower court (Rechtbank) (Art. 26 AWR). The appeal must be lodged within 6 weeks after the date of the decision of the tax inspector (Arts. 26c AWR and 6:7 Awb).

The appeal must state all the objections to the decision of the tax inspector. It is, however, allowed to lodge a pro forma appeal (i.e. a mere statement that the company appeals the decision, without stating the grounds on which the appeal is based). The court will set a term for the company to rectify the omission to state the grounds on which the appeal is based. The company and the tax inspector are invited to make their case before the court in person. The company does not have to be represented by a legal representative.

The lower court must render its written decision within 6 weeks after the closure of its investigations (Art. 8:66 Awb). In extraordinary circumstances, this period is extended by another 6 weeks. The lower court may also render an oral decision, which can be stated after the hearing. The oral decision may be adjourned for 2 weeks (Art. 27d AWR).

A company may file a request for a provisional ruling by the lower court if an objection or an appeal already has been lodged. The court of appeals considers the request only if sufficient interest has been proven.

Within 6 weeks after the decision of the lower court, an appeal may be lodged with a court of appeals (Gerechtshof) (Art. 27h AWR and 6:7 AwB). The procedural aspects are the same as before the lower court (see above). The court of appeals may decide to refer a case back to the lower court if (i) it nullifies a decision according to which the lower court is incompetent to decide the case or (ii) it decides for other reasons that a case has to be decided again by the lower court (Art. 27q AWR).

Both the company and the tax authorities (i.e. the state, represented by the State Secretary for Finance) may lodge an appeal against the written decision of the court of appeals with the Supreme Court (Hoge Raad) (Art. 28 AWR). The appeal must be lodged within 6 weeks after the date the decision of the court of appeals was received by the party lodging the appeal (Art. 6:8 Awb). The appeal must be sent to the court of appeals whose decision is appealed. The court of appeals forwards the appeal to the Supreme Court (Art. 28b AWR).

The Supreme Court will take the appeal into consideration only on grounds of misunderstanding of the tax law or neglect of procedure by the court of appeals; no appeal on the facts is possible.

#### **4.4. APPLICATION FOR REFUND (ART. 1(15) AND 1(16))**

No relevance in the context of Netherlands law.

## 5. FRAUD AND ABUSE (Art. 5)

### 5.1. MEASURES UNDER ART. 5(1) OF THE DIRECTIVE

#### 5.1.1. Domestic

In addition to the transfer pricing and thin capitalization rules (see introduction 1.2.1. a. *Thin capitalization* and 1.2.1. c. *Transfer pricing*), artificial or simulated transactions may be ignored by the tax administration and the Courts of Appeals through a determination of the facts rather than the form (substance over form). In addition, there is a specific provision and a general principle to combat tax avoidance or evasion (i.e. transactions the main purpose of which is avoidance or evasion of tax):

- (1) the just levying (*richtige heffing*), under which the legal act in dispute may be ignored for tax purposes (Art. 31 et seq. AWR). This procedure is subject to prior approval by the Ministry of Finance and involves a lot of administrative work. Therefore, this procedure is not commonly used;
- (2) the abuse of law doctrine (*fraus legis*), which is not laid down in tax law but is an interpretation method developed in case law. Under this provision, the spirit of the law is decisive, rather than the exact wording. The transaction in dispute may be converted to the closest equivalent which does not give rise to an abuse of law. The abuse of law procedure can be used only as a last resort.

In general, the results of both procedures are the same for the taxpayer.

#### 5.1.2. Agreement-based

No relevance in the context of Netherlands law.

### 5.2. MEASURES UNDER ART. 5(2) OF THE DIRECTIVE

No relevance in the context of Netherlands law.

### 5.3. COMPARISON WITH SIMILAR MEASURES UNDER PARENT-SUBSIDIARY AND MERGER DIRECTIVES

Netherlands law does not contain specific anti-abuse provisions with respect to the Parent-Subsidiary Directive. With respect to the Merger Directive anti-abuse provisions have been implemented in Art. 14(4) Vpb concerning asset mergers, Art. 14a(6) Vpb concerning divisions, and Art. 14b(5) Vpb concerning legal mergers. These anti-abuse provisions deny the benefits of the Merger Directive (as implemented in Dutch law) in case the merger or division had as its main goal the avoidance or deferral of taxation.

## **6. SUMMARY**

The Netherlands did not implement the provisions of the Directive as no withholding tax on interest and royalties is levied. Only two specific provisions were changed to implement the Directive. These provisions concern the avoidance of dual residence of companies and the corporate income tax provision on debt-claims, which a foreign company has on a Netherlands company in which it holds a substantial shareholding.

The definition of interest of the Netherlands Model Treaty and the treaties with all EU Member States, except Austria, Belgium, France and Ireland, is not equal to the definition of the Directive as interest on profit sharing bonds is treated as a dividend. The definition of royalties as used in Netherlands is equal to the definitions set out in Art. 2 of the Directive.

Furthermore, both interest and royalties are subject to the transfer pricing principle and the constructive distribution rule.

Finally, interest from profit-sharing bonds is treated as a dividend and, therefore subject to a 25% withholding tax unless the requirements of the Parent-Subsidiary Directive are met.

## **PART II. THE AGREEMENT**

As the Netherlands does not levy a withholding tax on interest and royalties the agreement is generally not relevant for outbound interest and royalties but only for outbound dividend payments. With respect to interest payments, Art. 17a Vpb as described above may apply in specific situations.

On 6 December 2005 the Ministry of Finance published a Decree clarifying that upon request the Netherlands will grant an exemption for dividend withholding tax if the requirements of Art. 15(1) of the Agreement are met. The request for an exemption from applying the withholding tax must be submitted with the following details:

- the name, address, place of establishment and the place of the statutory seat of the qualifying Swiss company;
- the amount of the statutory share capital of the Netherlands company subscribed by the Swiss company;
- the part of the subscribed amount of the statutory capital of the Netherlands company that is directly or indirectly owned by the Swiss company; and
- confirmation that the capital of the Swiss company is entirely or partly divided into shares;
- the date(s) of when the qualifying Swiss company obtained the shares of the Netherlands company; and
- a confirmation that the qualifying Swiss company is subject to corporate income tax without benefiting from an exemption.

An approval, once granted, will remain applicable as long as the Swiss company remains a resident of Switzerland for the purposes of the Agreement, and the shareholding requirement continues to be met.

The Decree regulates that the Agreement will apply retroactively as from 1 July 2005.

## ANNEX

Table of the maximum withholding tax rates on interest and royalty payments under the tax treaties between the Netherlands and the EU Member States.

EU Member State	Interest (%)	Royalties (%)
Austria	0	0/10
Belgium	0/10	0
Czech Republic	0	5
Denmark	0	0
Estonia	0/10	5/10
Finland	0	0
France	0/10	0
Germany	0	0
Greece	8/10	5/7
Hungary	0	0
Ireland	0	0
Italy	10	5
Latvia	0/10	5/10
Lithuania	0/10	5/10
Luxembourg <1>	0	0
Malta	10	0/10
Poland	0/5	5
Portugal	10	10
Slovak Republic	0	5
Slovenia	0	10
Spain	0/10	5/6
Sweden	0	0
United Kingdom	0	0

<1> The treaty does not apply to income paid to exempt Luxembourg holding companies.

<2> The treaty concluded between the Netherlands and the former Yugoslavia.