The Netherlands

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TAX AUTHORITIES

1. What are the main authorities responsible for enforcing taxes on corporate transactions in your jurisdiction?

The Dutch Revenue Service (*Belastingdienst*) (DRS) is responsible for enforcing all Dutch national taxes. The DRS is divided into 13 geographic divisions.

Generally, the place of residence of an entity or individual within The Netherlands determines which geographic division is competent. If that place of residence is outside The Netherlands, the Limburg division is usually competent. However, exceptions may apply to these general rules (for example, a company that is at least 70% engaged in financing activities falls under the Rotterdam/Rijnmond division).

The competence of an individual tax inspector is, in principle, limited to the enforcement of one specific tax (for example, corporate income tax or value added tax).

2. Is it possible to apply for tax clearances or obtain guidance from the tax authorities before completing a corporate transaction? If yes, provide brief details, including whether clearance or guidance is binding.

The DRS is easy to access to obtain tax clearances. Taxpayers can apply to the DRS for:

- An advance pricing agreement (APA) on transfer-pricing issues. This is unilateral, bilateral or multilateral.
- An advance tax ruling (ATR) for other issues, such as the participation exemption.
- Formal approval to obtain certain specific relief.

The taxpayer must submit ruling requests to the competent tax inspector. These rulings are governed by detailed procedural regulations, but the requests have no strict format. Rulings generally last for four or five years and must then be renewed. Specific information must accompany a request, for example, information on the transaction and the parties, and, for an APA, a functional analysis and benchmarking study.

MAIN TAXES ON CORPORATE TRANSACTIONS

3. What are the main transfer taxes and/or notaries' fees potentially payable on corporate transactions? In relation to each tax/fee identified, explain briefly:

- **Its key characteristics.**
- **What triggers it.**
- **Who is liable.**
- **The applicable rate(s).**

Real estate transfer tax

Real estate transfer tax (*overdrachtsbelasting*) is charged on:

- The acquisition of real estate located within The Netherlands.
- The acquisition of rights in or to this property (including economic (similar to beneficial) as well as legal ownership).

It is charged at 6% of the fair market value of the property (or, if higher, the sale price), and is payable by the acquirer.

An acquisition of an entity's shares can be subject to real estate transfer tax if 70% or more of its assets are (or have been) Dutch real estate held for the purpose of acquiring, alienating or exploiting this real estate.

Notaries' fees

A civil law notary is required for the transfer of:

- Real estate.
- Shares in a private limited company (*besloten vennootschap*) (BV) or a public company (*naamloze vennootschap*) (NV).

Exceptions can apply, for example, to a public company's bearer shares and listed shares.

Membership rights in a Dutch co-operative (*coöperatie*) (Co-op) can generally be transferred without a civil law notary, unless the co-operative's articles of association provide otherwise.

Notaries' fees are not contingent on the value of the transaction, but generally depend on the amount of work involved. Liability for notaries' fees is a question of negotiation between the parties.

Corporate Q&A

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4. What are the main corporate and/or capital gains taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- **Its key characteristics.**
- **What triggers it.**
- **Who is liable.**
- **The applicable rate(s).**

Corporate income tax

Dutch corporate income tax is levied from Dutch-resident companies. These are:

- Companies that are incorporated under Dutch law, for example BVs, Co-ops and NVs.
- Certain other entities specified by law.
- Equivalent foreign entities that have their place of effective management and control in The Netherlands.

With regard to certain other legal entities (for example, Dutch foundations (*stichtingen*)), corporate income tax may still be charged, but only if and insofar as the entity carries on an enterprise.

Resident companies pay tax over their worldwide profits (including capital gains). However, applicable tax treaties or domestic double-taxation relief rules can limit the application of Dutch corporate income tax to specified Dutch-source income. In addition, certain exemptions apply, most notably the participation exemption (*see Question 10*).

Non-resident companies are also subject to corporate income tax in certain circumstances (*see Question 7*).

The corporate income tax rate for 2010 is:

- 20% for profits up to EUR200,000 (about US$268,000).
- 25.5% for profits exceeding EUR200,000.

Qualifying income from research and development is taxed at an effective rate of about 5% (10% over previous years). An election can be made for this rate to apply to intangible assets that were either:

- Created after 2006 and for which a patent was obtained.
- Created after 2007 on the basis of research for which a research and development statement was issued.

Companies pay corporate income tax on their annual taxable profits after allowable deductions and any available loss relief. Profits are calculated in the same way for residents and non-residents, attributed to each taxable period (generally a period of 12 months), according to the principle of sound business practice. The meaning of sound business practice has been developed by the courts and in many respects follows generally accepted accounting principles.

A tax return must be:

- Based on the financial statements used under statutory reporting rules.
- Denominated in euro, unless conditions are satisfied to use a functional currency (that is, a currency in which a company conducts most of its business) and the taxpayer files a request accordingly.

Losses can generally be carried:

- Forward nine years.
- Back one year.

However, anti-avoidance rules can prohibit the carryover of losses if 30% or more of the original shareholders dispose of their shares and certain other conditions are satisfied. Specific loss compensation rules apply to holding and financing companies.

In 2010, a temporary relaxation has been introduced for backward loss compensation in connection with the financial crisis. Capital gains are taxed as income. Certain assets can be depreciated over time (*see Question 12*).

5. What are the main value added and/or sales taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- **Its key characteristics.**
- **What triggers it.**
- **Who is liable.**
- **The applicable rate(s).**

Value added tax (VAT)

VAT is the most significant indirect tax in The Netherlands. It is levied on the net invoice amount charged by suppliers for supplies of goods and services within The Netherlands. The normal VAT rate is 19%. A reduced rate of 6% applies to a number of goods and services, most of which are basic necessities. A zero rate applies to exports and supplies within the EU.

The supplier of the goods and services pays VAT to the tax authorities, unless the place of supply is deemed to be outside The Netherlands. Business-to-business services are generally deemed to be supplied (and therefore taxable) where the recipient of the services is established.

If the recipient is an entrepreneur, the recipient can reclaim VAT (input VAT) levied on goods or supplies received if attributable to either:

- VAT-taxable activities.
- Certain VAT-exempt financial services rendered to non-EU persons and to non-EU permanent establishments (PEs) (that is, places of business through which companies carry on all or part of their business activities).

There are no other sales or value added taxes.

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6. Are any other taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- **Its key characteristics.**
- **What triggers it.**
- **Who is liable.**
- **The applicable rate(s).**

Dividend withholding tax

Dividend withholding tax is levied on (deemed) dividend distributions (and is therefore relevant to transfer pricing adjustments). Tax is levied from the party entitled to the dividend but withheld by the company distributing the dividend. The rate in 2010 is 15% (*see Question 8*).

Excise duties

Excise duties (*accijns*) are payable on:

- Motor fuel.
- Tobacco products.
- Beer.
- Soft drinks.
- Mineral oils.
- Sugar.
- Products containing alcohol.

Excise duties are included in the price of the goods and are not generally creditable or refundable.

Insurance tax

Insurance tax (*assurantiebelasting*) is charged on payments under insurance contracts covering risks located in The Netherlands. The rate is 7.5% of the net premium.

7. In what circumstances will the taxes identified in *Questions 3* to *6* be applicable to foreign companies (in other words, what "presence" is required to give rise to tax liability)?

Real estate transfer tax

Liability for real estate transfer tax depends on whether the acquired property is located in The Netherlands, rather than on the location or residence of the parties to the transaction (*see Question 3*).

Corporate income tax

Non-resident companies are taxed on the following Dutch-source income:

- Business income derived from a PE or permanent representative (PR) in The Netherlands. A PR is similar to the concept of a dependent agent used in the OECD Model Double Taxation Convention on Income and on Capital.
- Income or gains from a substantial shareholding (at least 5%) in a resident company if the shares do not constitute business assets, that is, broadly, the shares are held to create a normal return on investment.
- Certain other income closely connected to Dutch sources, for example, income or gains from immovable property located in The Netherlands.

VAT

VAT depends on where the supply takes place rather than the supplier's tax residence. However, the place of supply may depend on where the supplier has established its business or has a PE.

DIVIDENDS

8. Is there a requirement to withhold tax on dividends or other distributions? If yes, provide brief details.

Dividend withholding tax

In general, Dutch-resident companies pay 15% withholding tax on dividend distributions. The tax also applies to other similar payments, for example, certain share repurchases and liquidation distributions, as well as interest paid on hybrid loans (that is, instruments that qualify as equity for tax purposes). Hybrid loans have been defined by the courts and can include, for example, a profit-related, perpetual and subordinated loan.

An exemption applies if the dividend is one of the following:

- Covered by the participation exemption (*deelnemingsvrijstelling*) (*see Question 10*).
- Distributed to a member of the distributing company's fiscal unit (tax group) (*see Question 10*).
- Distributed to a qualifying EU parent. A parent is qualifying if it holds 5% of its subsidiaries and satisfies the further conditions regarding, among other things, the legal form laid down in the Dividend Withholding Tax Act 1965 (*Wet op de dividendbelasting*), which implements Directive 90/435/EEC on the taxation of parents and subsidiaries, as amended by Directive 2003/123/EC.

The company can obtain a refund if a dividend is distributed to an exempt entity (for example, a pension fund) located in The Netherlands or elsewhere in the EU.

In certain circumstances, the amount of withholding tax on outgoing dividends can be reduced by a credit for foreign dividend withholding tax imposed on incoming dividends that both:

- Have been received by the distributing company.
- Are redistributed within two years.

Reductions or exemptions can also arise under an applicable tax treaty.

In certain cases, the DRS can seek to deny the right to a reduction or exemption, under anti-dividend-stripping rules. These rules typically apply when taxpayers try to reduce withholding tax by selling and buying back shares or coupons to others qualifying for mitigated rates or refunds.

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SHARE ACQUISITIONS AND DISPOSALS

9. What taxes are potentially payable on a share acquisition/ share disposal?

Real estate transfer tax

If 70% or more of an entity's assets are Dutch real estate, a disposal of that entity's shares can be subject to tax if the disposal means that the acquirer obtains an interest of one-third or more in that entity. The law provides for certain exemptions from this tax, particularly with respect to mergers and other reorganisations or transfers between related companies.

Corporate income tax

Resident companies can be liable to pay corporate income tax on capital gains arising from a disposal of shares, unless the participation exemption applies (*see Question 10*).

Non-resident companies can be taxed on income from a substantial shareholding (at least 5%) in a resident company if the shares are not considered business assets and if a tax treaty does not deny The Netherlands the right to tax.

VAT

No VAT is levied on share transactions. Share transfers are VAT exempt (which does not necessarily mean related input VAT cannot be reclaimed) (*see Question 5*).

Notaries' fees

A notary is required for the transfer of shares in a BV and NV (unless exceptions apply) (*see Question 3*).

10. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Participation exemption

The participation exemption (*deelnemingsvrijstelling*) is an exemption from corporate income tax for profits derived from qualifying shareholdings. Hybrid loans generally also qualify for the exemption, provided that the creditor also holds a qualifying shareholding in the debtor company.

Profits for these purposes include:

- Cash dividends.
- Stock dividends.
- Bonus shares.
- Dividends-in-kind (that is, non-cash dividends).
- Deemed profit distributions.
- Capital gains realised on the disposal of a shareholding (including foreign exchange gains and, subject to certain conditions, hedging agreements (that is, an agreement on an investment that is taken out specifically to reduce or cancel out the risk in another investment related to exchange gains and losses)).

The participation exemption was relaxed from 1 January 2010. The conditions for the exemption to apply are as follows:

- The participation must be 5% or more of the nominal paid-in share capital or, in some cases, voting rights.
- The participation is either:
  - not considered a portfolio investment subsidiary. The participation is not considered a portfolio investment subsidiary if it is held in the ordinary course of business and not as a portfolio investment ("motive test"). In general the motive test is deemed to be met if:
    - the Dutch resident corporate taxpayer has actual influence on or is actively involved with the subsidiary's business operations ("business link"); or
    - the (ultimate) shareholder of the Dutch resident corporate taxpayer carries on a business that is in line with subsidiary's business activities ("link function"); or
  - considered a qualifying portfolio investment subsidiary. This means that:
    - the participation is subject to a "realistic level" of taxation (in principle, a statutory rate of a least 10%), ("subject-to-tax test"); or
    - the subsidiary's assets (together with its direct and indirect subsidiaries) do not - directly or indirectly - largely (that is, for more than 50%) consist of low-taxed (that is, less than 10%) portfolio investments ("asset test"). Real estate does generally not qualify as a portfolio investment under the asset test. Less than 5% interests in subsidiaries are deemed to be portfolio investments, as well as intra-group receivables and assets deployed for intra-group leasing activities.

Under the current subject-to-tax test, it is in principle no longer necessary for foreign profits to be recalculated according to Dutch tax rules, although certain tax base differences (for example, tax holidays) can still cause a company not to meet this test.

If a non-qualifying subsidiary holds 90% or more low-taxed portfolio investments, the shareholding must be revalued annually and taxed accordingly.

There is no minimum holding period for the exemption to apply.

If a loan is incurred to finance an acquisition, interest on this loan is deductible, irrespective of the subsidiary's residence, although other limitations to interest deduction (for example, thin capitalisation rules) may apply. Liquidation losses on participations are deductible subject to certain conditions. Acquisition and disposal costs are non-deductible.

Share merger relief

If shares in a target company are exchanged for shares in an acquiring company:

- The target company's shareholders are exempt from corporate income tax on the transfer.
- The existing tax basis in the target shares rolls over to the shares received in consideration. This defers any gain made by the shareholder in the target company, so tax on capital gains does not arise.

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- The relief is generally limited to transactions involving Dutch or EU-resident target companies, and which result in the acquiring company holding more than 50% of the target company's voting rights. Acquisitions of non-EU shareholdings by a Dutch resident company are also covered, provided that after the acquisition, the company holds more than 90% of the voting rights in the target.
- A cash partial payment of up to 10% of the nominal value of the shares issued under the share merger is permitted. The relief is then limited to the shares acquired.
- The relief is not available where the transaction substantially aims to avoid or defer taxation. Before carrying out the transaction, the parties can request confirmation from the DRS that relief will not be denied on these grounds.

For Dutch corporate income taxpayers, the importance of the share merger relief is limited, because of the participation exemption (*see above, Participation exemption*).

11. Please set out the tax advantages and disadvantages of a share acquisition for the buyer.

Advantages

The main advantage of a share acquisition (as opposed to an asset acquisition) for the buyer is that the buyer can under certain conditions set off the target company's tax losses over the previous periods against future profits of the target company. Generally, real estate transfer tax does not apply, because the buyer is acquiring shares rather than real estate. An acquisition of an entity's shares can be subject to real estate transfer tax if 70% or more of its assets are (or have been) Dutch real estate held for the purpose of acquiring, alienating or exploiting this real estate (*see Question 3*).

The buyer can also benefit from the seller's ability to apply the participation exemption, because this can reduce the purchase price (*see Question 10, Participation exemption*).

Disadvantages

The main disadvantage of a share acquisition is that the buyer also acquires the target company's tax and other liabilities, including, for example, recapture mechanisms.

In addition, depreciation will be based on the assets' existing book value rather than their acquisition price. This also means that capital gains tax liability is higher when the assets are disposed of.

The buyer is also potentially liable to dividend withholding tax on retained earnings that are ultimately distributed to shareholders.

12. Please set out the tax advantages and disadvantages of a share disposal for the seller.

Advantages

If the Dutch participation exemption applies (*see Question 10, Participation exemption*), shares can be transferred without Dutch corporate income tax arising.

Disadvantages

The main disadvantage for the seller is that the seller can no longer use the tax losses for future loss compensation. The participation exemption can also be a disadvantage, as it can apply to losses, which then cannot be deducted from profits.

13. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Fiscal unit

A fiscal unit is a tax group that is formed between a parent company and any of its 95% or more subsidiaries. In general, the companies must be resident in The Netherlands. On the basis of recent European Court of Justice case law, it appears that indirectly held Dutch subsidiaries should also be able to become a part of a fiscal unit. The main advantage of a fiscal unit is that the losses of one company in the group can be set off against the profits of another in the year in which they are incurred. For example, interest expenses incurred by a resident holding company to acquire a resident subsidiary can, subject to certain conditions, be set off against the profits of that subsidiary. In addition, assets and liabilities can generally be transferred from one company to another without tax consequences.

There are specific rules in place to curb the abuse of fiscal units. In particular, extensive rules restrict a taxpayer's ability to carry forward pre-fiscal unit losses, or carry back post-fiscal unit losses, to set them off against fiscal unit profits.

Participation exemption and share merger relief

The transaction can be structured to take advantage of the participation exemption and share merger relief (*see Question 10*).

ASSET ACQUISITIONS AND DISPOSALS

14. What taxes are potentially payable on an asset acquisition/asset disposal?

In principle, any capital gain realised on the disposal of an asset is subject to corporate income tax (*see Question 4*). Depending on the asset in question, the transfer of an asset can give rise to real estate transfer tax and VAT (*see Questions 3 and 5*).

15. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Reinvestment reserve

The capital gain on the disposal of an asset can be deferred by creating a reinvestment reserve. This operates through a rollover technique, so that the gain on the sale of one business asset can reduce the tax basis of another business asset or assets. The relief is subject to various conditions, including a three-year reinvestment period and, in some cases, the type of new asset.

Business merger

A business merger is essentially the transfer of a business (or independent part of a business) by one company (original company)

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to another new or existing company (acquiring company) in exchange for an issue of new shares to the original company. A small amount of non-share consideration is permitted. The relief means that:

- The original company pays no corporate income tax on the transfer.
- The original company's assets transfer on their existing tax basis, so that any gain is deferred until the acquiring company sells them.
- The relief is not restricted to resident companies, but may, for example, be available to a business carried on through a Dutch PE. The relief is generally available automatically, although in some cases it is subject to the satisfaction of certain conditions provided in the regulations which are designed to protect The Netherlands' future right to tax (for example, if the assets transferred include assets that, after the transfer to a Dutch PE, would not be located in The Netherlands and would not therefore be taxable).
- In general, the original company's pre-merger losses cannot be transferred to the acquiring company to be set off against the acquiring company's profits, and the acquiring company's post-merger losses cannot be carried back to be set off against the original company's profits. However, the exception to this rule is when a Dutch PE is transferred to a resident company. If the original company is no longer subject to Dutch tax after the merger, the acquiring company can submit a request to carry losses forward or back, as long as these losses are set off against the profits from the assets that generated the losses.
- Anti-avoidance rules also apply to business mergers.

Transfer of a business

No VAT is payable when all, or an independent part, of a company's business is transferred and the business continues to operate as before. However, this exception does not apply to the sale of a single asset or inventory (that is, either raw materials, finished items already available for sale, or goods in the process of being manufactured).

Depreciation of assets

The buyer may be able to depreciate and amortise its assets tax effectively.

Business assets with a limited useful life of more than one year must be capitalised and depreciated over their useful lives. There is a choice of depreciation methods (generally straight-line or declining balance), provided that the chosen method is applied consistently and is in accordance with sound business practice.

Goodwill can be amortised over a period of ten years or more, while for other business assets the minimum depreciation or amortisation period is five years. For buildings, special rules apply.

Free depreciation is allowed in limited circumstances (for example, for costs of internal production of intangible assets and qualifying "green" assets). Over 2009 and 2008, a special depreciation regime was introduced in connection with the financial crisis, enabling companies to depreciate within two years a broad variety of qualifying assets acquired in 2009 and 2010.

Investment allowances

Investments in qualifying assets can qualify for a special deduction in calculating taxable profits. This is given in addition to the normal depreciation claimed and is calculated as a percentage of the qualifying expenditure. The relief falls into three main categories:

- Small-scale investment deduction. Up to 28% can be deducted for investments of up to EUR300,000 (about US$415,371), with the percentage reducing as the expenditure increases.
- Energy investment deduction for designated assets. 44% can be deducted for up to EUR115million (about US$159.4 million) of investment.
- Environmental investment deduction for designated assets. 15%, 30% or 40% (increased during 2010 to 35%, 50% and 60%) can be deducted depending on the type of asset. This cannot be claimed in combination with the energy investment deduction.

16. Please set out the tax advantages and disadvantages of an asset acquisition for the buyer.

Advantages

The advantage of an asset acquisition (as opposed to a share acquisition) for the buyer is that all or part of the purchase price can be depreciated or amortised for tax purposes. The assets are acquired without tax liabilities or recapture mechanisms. Depreciation will be based on acquisition value, and capital gains tax liability will be lower. The buyer does not acquire any tax liability on retained earnings.

If the buyer has loss-making companies in its group, these companies can absorb profitable operations, therefore increasing the ability to use losses. Investments in qualifying assets can qualify for a special deduction in computing taxable profits.

Disadvantages

An asset disposal is often unattractive to the seller, which increases the sale price (*see Question 17, Disadvantages*). Real estate transfer tax may also apply. The seller retains the benefit of any losses incurred by the company holding the assets.

17. Please set out the tax advantages and disadvantages of an asset disposal for the seller.

Advantages

The capital gain on an asset can be deferred by creating a reinvestment reserve (*see Question 15, Reinvestment reserve*). If an asset sale creates a loss, this loss can be deductible against the seller's taxable profits. The seller may be able to use possible tax losses for future loss compensation.

Disadvantages

The main disadvantage of an asset disposal for the seller is that capital gains realised by an asset disposal are generally taxed. In addition, real estate transfer tax may apply, reducing the purchase price.

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18. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

There are no specific structures commonly used to minimise the tax burden on an asset acquisition, although transactions can be structured to qualify for the exemptions and reliefs available (*see Question 15*).

LEGAL MERGERS

19. What taxes are potentially payable on a legal merger?

In a legal merger, the assets and liabilities of one or more companies (original company) are transferred by operation of law to another new or existing company (acquiring company), and the original company ceases to exist. Generally, in exchange for the transfer, the merged company issues new shares to the original company's shareholders. Variations exist, for example, a merger between a parent and subsidiary or a triangular merger (where the consideration shares are issued by a member of the acquiring company's group).

In essence, a legal merger is an acquisition and disposal of assets in respect of which tax relief may be available (*see Question 16*). In the absence of this relief, capital gains made on assets are subject to corporate income tax (*see Question 4*) and the acquisition of assets can give rise to real estate transfer tax and VAT (*see Questions 3 and 5*).

A legal merger requires the execution of a notarial deed (*see Question 3*).

20. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

The following relief applies to a legal merger:

- The original company pays no tax on the disposal of its assets.
- The merged company obtains the original company's existing tax basis in the transferred assets, liabilities and fiscal reserves, which effectively defers any gain.

Generally, pre-merger losses can be transferred to the acquiring company and the acquiring company's post-merger losses can be carried back to the original company. This is subject to losses being streamed against profits from the same assets. Under Directive 2005/56/EC on cross-border mergers of limited liability companies, mergers with qualifying EU companies are in principle possible with tax relief. The relief does not apply if the legal merger substantially aims to avoid or defer taxation.

No VAT is due when all, or an independent part, of a company's business is transferred under a legal merger and this business operates as before.

21. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

There are no specific structures commonly used to minimise the tax burden on a legal merger.

JOINT VENTURES

22. What taxes are potentially payable on establishing a joint venture company (JVC)?

There is no special tax on the establishment of a JVC. When assets are transferred to the JVC, real estate transfer tax, notary duties, corporate income and VAT may be payable on the transfer (*see Question 3* to *6,* and *14*).

23. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

The reliefs available on an asset acquisition are also available for a JVC, depending on how the JVC is structured (*see Question 15*).

24. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

There are no generic transaction structures to reduce the tax burden, although transactions can be structured to qualify for available reliefs and exemptions (*see Question 23*).

COMPANY REORGANISATIONS

25. What taxes are potentially payable on a company reorganisation?

Company reorganisations are not treated separately for legal or tax purposes. A wide range of legal techniques are available to realise a company reorganisation.

In essence, the tax consequences of a company reorganisation result are similar to those of a share acquisition (*see Question 9*) or asset acquisition (*see Question 14*).

Legal (de)mergers have similar tax consequences to those of an asset acquisition and disposal, and may benefit from special tax relief (*see Questions 19* and *20*). In the absence of any special tax relief, capital gains on assets are subject to corporate income tax and the acquisition of assets can give rise to real estate transfer tax and VAT (*see Question 3* to *6,* and *14*).

26. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Company reorganisations are not treated separately for legal or tax purposes. Therefore, there are no special reliefs available,

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although reliefs that apply to an asset acquisition may apply (*see Question 25*).

27. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

There are no generic transaction structures to reduce the tax burden, although transactions can be structured in order to qualify for reliefs and exemptions available.

RESTRUCTURING AND INSOLVENCY

28. What are the key tax implications of the business insolvency and restructuring procedures in your jurisdiction?

Corporate restructurings and business insolvencies can give rise to a wide range of tax issues in The Netherlands, for example:

- There are elaborate anti-abuse provisions which restrict the carry-over of losses where a change of control occurs and where losses have been incurred by a holding company.
- Profits realised from debt forgiveness which exceed the losses of current and past years qualify under certain circumstances for a waiver of debt income exemption.
- A write-down on a loan is deductible, but may result in profit when converted into shares.
- There are anti-abuse provisions targeting the disposal of written down loans in case of a tainted transaction.
- The difference between assets' and liabilities' tax book value, and the market value on liquidation of a Dutch corporate taxpayer, is recognised for corporate income tax purposes.

SHARE BUYBACKS

29. What taxes are potentially payable on a share buyback?

Share buybacks (that is, repurchases and redemptions) by a resident company from its shareholder are generally treated as dividends for the purposes of the dividend withholding tax, to the extent that the payment exceeds the capital that is recognised for tax purposes. Any difference between acquisition cost and the buyback proceeds in general results in a corporate income tax liability of a corporate shareholder.

30. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Dividend withholding tax

Share buybacks are exempt from dividend withholding tax if one of the following exemptions applies. Buybacks are exempt if the shares are:

- Bought back to satisfy employee share options and held as treasury shares for no more than three months.
- Bought back for other purposes and held as treasury shares as a temporary investment.
- Bought back by regulated investment funds, subject to certain conditions, for example, the relationship between the bought back shares and the newly issued shares.
- Quoted on a stock exchange if certain conditions are satisfied, such as anti-avoidance regulations.
- Bought back from a shareholder entitled to an exemption or other relief from dividend withholding tax.

Corporate income tax

When the participation exemption applies, the buyback proceeds will be exempt from corporate income tax when received by a corporate shareholder (*see Question 10, Participation exemption*).

31. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

A share buyback can be structured to benefit from the share buyback reliefs (*see Question 30*).

PRIVATE EQUITY FINANCED TRANSACTIONS: MBOs

32. What taxes are potentially payable on a management buyout (MBO)?

If a corporate shareholder sells shares in a target company to a company held by a private equity fund with management (MBO), the transaction is subject to the usual taxes on corporate transactions.

In addition, there are the following more specific tax considerations:

- Managers may have to pay payroll or income tax. Rates depend on the form and size of the investment acquired.
- Income (including capital gains) from typical carried interest schemes is taxed if it is considered to be a "lucrative interest". A lucrative interest arises when a taxpayer has acquired shares, receivables or rights with similar economic characteristics which are considered intentionally granted as remuneration for services to be provided by the taxpayer or certain related persons in The Netherlands.

  Shares can only constitute a lucrative interest when:

  - the taxpayer owns preference shares with a preferred dividend of at least 15% per annum; or
  - there are various classes of shares and both:
    - the shares held by the taxpayer rank as junior to other classes of shares; and
    - the class of shares held by the taxpayer represents less than 10% of the share capital.

  Receivables constitute a lucrative interest if the yield depends 15% or more on management or shareholder targets such as profit, turnover, or realisation of an exit.

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- In relation to its shareholding in the acquiring company, the private equity fund may also be liable to the following tax:
  - dividend withholding tax on the dividends; and
  - corporate income tax on capital gains realised.

These liabilities can occur because private equity funds are typically organised as a partnership that does not provide for tax treaty protection. Under a tax treaty, typically dividends paid to a foreign corporate shareholder are subject to low or no Dutch dividend withholding tax, depending primarily on the percentage of ownership. In addition, capital gains from a shareholding in a Dutch company are only taxable in the residence jurisdiction of the shareholder.

33. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Subject to the legal form of the MBO, the usual exemptions and reliefs from corporate tax apply. Under certain conditions, private equity funds can reduce dividend withholding tax and corporate income exposure by applying a look-through approach to tax treaty protection, if the investor in the private equity fund would be entitled to treaty protection had it invested directly in the acquiring company.

34. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

A blocker entity is typically interposed between the private equity fund and the acquiring company, to avoid dividend withholding tax and corporate income tax liability. Typically, the existence of the blocker entity gives rise to tax treaty relief or a domestic law exemption (for example, when the blocker entity is a co-operative association).

REFORM

35. Please summarise any proposals for reform that will impact on the taxation of corporate transactions.

There are no tax reform proposals submitted to parliament that will affect the taxation of corporate transactions.

However, the State Secretary of Finance announced on 5 December 2009 that he was considering submitting a legislative proposal:

- To discourage excessive leveraged takeovers of Dutch target companies where the Dutch acquisition company forms a fiscal unit with the target company, to offset the interest expenses with the taxable profit of the target company (*see Question 13*).
- To disregard losses of foreign branches of Dutch corporate taxpayers when calculating the tax base for Dutch taxation purposes.

At the same time, it indicated that a special tax regime for interest income at an effective corporate income tax rate of 5% would be reconsidered.

In addition, on 7 April 2010 a Working Group appointed by the Minister of Finance released a White Paper on reform of the Dutch tax system, making several recommendations.

In light of the forthcoming parliamentary elections in June 2010 and the formation of a new coalition, it is expected that these proposals and developments will become subject to further discussions.

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