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# The Netherlands

## International Estate Planning Guide

Individual Tax and Private Client Committee

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## I. Wills and Disability Planning Documents

### A. Will Formalities and Enforceability of Foreign Wills

#### 1. The Form of Last Will and Testaments

Generally, a last will and testament is executed in the form of a deed prepared by a Dutch civil law notary. A holographic will (handwritten by the testator) is also possible, although very uncommon. A holographic will must be deposited by a Dutch civil law notary. In the deed of deposit the testator must declare, among other things, that his holographic will meets the statutory standards and is deposited by the civil law notary executing the deed.

#### 2. Codicils

Dispositions with regard to clothing, personal objects, jewelry, furniture and specific books can be made in a codicil that needs to be handwritten, dated, and signed by the testator.

#### 3. Post Death Variations

The beneficiaries under a will cannot make a post-death variation of the will. The preparation of a will is a strictly personal matter that cannot be delegated to the beneficiaries.

#### 4. The Hague Testamentary Dispositions Convention

The Netherlands is a party to the HCCH Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions 1961 (Hague Testamentary Dispositions Convention). Under this convention, a will made in another jurisdiction is recognised as valid, if its form complies with the internal law of:

- the country where the testator made the will;
- the country of the testator's nationality, domicile or habitual residence (either at the time when he made the will or at the time of his death); or
- the country where the assets are located (for immovable property).

The Netherlands has made a reservation under Article 10 of The Hague Testamentary Dispositions Convention to the effect that oral testamentary dispositions are not recognized as valid.

### B. Will Substitutes (Revocable Trusts or Entities)

The Netherlands does not have trust law. However, it is a party to the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985 (Hague Trusts Convention). The Netherlands recognizes trusts governed by the laws of other jurisdictions.

### C. Powers of Attorney, Directives, and Similar Disability Documents

If a person is put under legal restraint (*curatele*) by the sub-district court, the court appoints a legal guardian (*curator bonis*) to represent him. A sub-district court can also impose an administrator for an adult's property if the adult cannot administer his own property. The administrator manages the property.

A power of attorney, given before the loss of capacity, remains valid. Foreign powers of attorney are normally recognized, but a notarial power of attorney is required for certain legal acts, such as mortgaging Dutch immovable property.

To plan for loss of capacity a 'living will' can be made. A living will usually contains one or more powers of attorney and may also contain medical provisions such as a do not resuscitate order.

## II. Estate Administration

### A. Overview of Administration Procedures

#### 1. Administration of the Estate

Dutch conflict of law rules provide that in principle the law governing succession also governs the transfer of possession of goods and rights and the administration of the estate. Therefore, a foreign grant of probate is recognized if it complies with the formalities prescribed by the law governing the succession. Succession law does not distinguish between movable and immovable property.

There are no special formalities in relation to the transfer, gathering, and administration of the estate. The heirs can take possession of all of the deceased's assets from the moment of death. The deceased's estate passes directly to the heirs (*saisine*), unless the deceased has provided otherwise in his last will and testament. An heir can opt to refuse the inheritance or to accept it subject to the privilege of an inventory (*beneficiaire aanvaarding*). In the case of refusal, the heir renounces his inheritance. In the case of acceptance subject to the privilege of an inventory there will be no liability for debts exceeding the value of the heir's share in the estate.

Both refusal and acceptance subject to the privilege of an inventory are effected by making an official statement to the clerk of the court within whose district the deceased last resided.

#### 2. Certificate of Inheritance

Under Dutch law the certificate of inheritance (*verklaring van erfrecht*) has an important function in the winding up of an estate. A certificate of inheritance is a statement, issued by a Dutch civil law notary, providing evidence of the beneficiaries' authorisation to dispose of the assets that form part of the estate. The persons with the authorisation to dispose of the estate's assets can identify themselves in judicial matters by means of the certificate of inheritance. If the deceased has appointed an executor, a certificate of execution (*verklaring van executele*) can be issued in a similar manner. By means of such declaration, the executor can identify himself and exercise the powers granted to him in the last will and testament.

#### 3. Executor and Administrator

If the deceased has appointed an executor with the authority to administer the estate, the executor represents the heirs during administration. The executor can sell the deceased's assets, if there are insufficient funds to discharge all the legacies. In all other cases the executor requires the heirs' unanimous consent to dispose of the assets. The deceased can limit the executor's authority. For example, the executor can be responsible only for handling the funeral or the payment of a specific legacy. If the deceased has expressly authorized the executor to act as a settlement administrator (*afwikkelingsbewindvoerder*), the executor can dispose of the estate without the heirs' consent. Once the executor completes his task, he must submit an account of the estate administration to the heirs.

It is possible to provide in the last will and testament that the beneficiary's acquisition is placed under administration (*bewind*). As a result of the administration the property is not controlled and managed by its owner (the beneficiary), but by the administrator (*bewindvoerder*) appointed in the will. During the operation of the administration the owner's debts may not be recovered from the relevant property. The duration of the administration must be determined in the will. In any event an administration ceases upon the death of the person who acquired the property. Also when five years have lapsed after the institution of the administration, the beneficiary may request the district court to terminate the administration provided that he can properly manage the assets himself. In some respects the administration is similar to

a trust. One of the main differences to a trust is that property kept under administration is held in the name of the owner and not in the name of the administrator.

In the event of a gift the donor may stipulate that the gift is put under administration.

## B. Intestate Succession and Forced Heirship

### 1. Intestate Succession

The inheritance law distinguishes between four groups of heirs. An heir in a preceding group excludes the heirs in the later groups. The groups are as follows:

- spouse (and registered partner) and descendants;
- parents, brothers and sisters and their descendants;
- grandparents and their descendants; and
- great-grandparents and their descendants.

In the absence of a will, cohabitants are not entitled to a share in their partner's estate.

### 2. Statutory Division

If a deceased person leaves behind a spouse and one or more children, the spouse and the children will inherit the estate, each taking an equal share. This does not mean that each of the heirs receives a share in the property of the estate. To protect the surviving spouse, Dutch inheritance law provides that all property of the estate vests in the surviving spouse. The surviving spouse must discharge all liabilities of the estate. The children receive a pecuniary claim equal to their share in the estate that in principle can only be collected upon either (i) the death of the surviving spouse or (ii) the bankruptcy of the surviving spouse or the application of a debt rescheduling arrangement. In his last will and testament a testator may include other events upon which the claim can be collected, such as remarriage of his spouse. This so-called statutory division (*wettelijke verdeling*) applies automatically unless the deceased has provided otherwise in his last will.

The children's claims bear interest if the statutory interest (that is, an interest in non-commercial matters that is periodically determined by the government) is higher than 6%. From 1 July 2011 the statutory interest is 4%. The deceased can provide for a different interest rate in his will. In addition, the deceased's heirs can agree upon a different rate of interest between themselves.

If a child predeceases his parent, that child's descendants are entitled to his share of his parent's estate. If there are no descendants, the living parents, brothers and sisters of the deceased child equally inherit his portion of his parent's estate.

### 3. Forced Heirship Rights

Children of the deceased have forced heirship rights (*legitieme portie*). They can be disinherited, but may always make a pecuniary claim of 50% of the value they would have received on intestacy. This claim needs to be made within five years of the deceased's death.

The children's forced heirship rights only apply with respect to the estate of their deceased parent. Therefore, for example, if the deceased was married and the community of property regime applied, the children are entitled to a quarter of the total property of the deceased and his spouse, since their deceased's parent's estate comprised only half of the total property.

A child claiming his forced heirship rights does not become an heir. He has a pecuniary claim against his deceased parent's estate. This claim can be recovered from estate assets. If the estate is insufficient to recover the entire claim, the children can recover their claims from certain gifts that were made by the deceased, for example:

- gifts made within five years preceding his death;
- gifts made to descendants; and/or
- gifts made with the intention of infringing upon forced heirship rights.

The children may recover their claim from trust assets, if the trust settlement is considered a donation by the deceased. Children can collect their forced heirship rights six months after their parent's death. However, the parent's will may contain a provision that the children can only collect their forced heirship rights after the death of their deceased parent's:

- spouse or registered partner;
- life partner with whom the parent entered into a notarial cohabitation agreement.

This provision can also apply if the deceased's spouse, registered or life partner is not a parent of the children.

#### 4. Disinherited Spouse

A disinherited spouse or registered partner has a number of statutory rights. For example, he or she can claim:

- the use (*usufruct*) of the family home and household effects;
- the use (*usufruct*) of other estate assets if he or she, when considering all circumstances, needs the assets for maintenance.

#### 5. Last Will and Testament

A form of last will which is frequently made by Dutch testators in order to ensure that the surviving spouse in any case continues to have the control of the entire estate on the death of one of the spouses, is the statutory division. The testator can stipulate in his last will that the surviving spouse has to pay a compound interest of six percent to provide that the claims of the children shall have accrued on the death of the surviving spouse.

In order to enhance the effect of inheritance tax on the statutory division, the surviving spouse's portion from the estate of the deceased may be diminished, causing an increase of the children's portion. In any case a certain portion must pass to the survivor, because otherwise a division between spouse and children cannot be made. If in the example given the portion of the surviving spouse were to be limited to one percent, the claims of the children would be 99 percent. If the deceased has stipulated in his last will that the surviving spouse has to pay a compound interest of six percent, the claims of the children will have accrued on the death of the surviving spouse.

Another form of last will which is frequently made by Dutch testators is a will containing a bequest of usufruct of the estate for the benefit of the surviving spouse. In this last will the children are appointed as the sole heirs (the surviving spouse is usually excluded as heir) and the usufruct of the children's portions is bequeathed and devised to the surviving spouse. The surviving spouse as usufructuary has the authority to manage the estate of the deceased, to use it and to enjoy its proceeds. Under Dutch law the

usufructuary may also be granted the right to dispose of and to expend the goods subject to the usufruct without the heirs' consent.

## C. Marital Property

### 1. Community of Property Regime

If a couple marries without making a prenuptial agreement, the couple automatically falls under the community of property regime (*wettelijke gemeenschap van goederen*). In principle, this regime covers all property, including property acquired before marriage and property acquired by inheritance, legacy or donation.

Certain assets that are very closely connected to one of the spouses (for example, compensation for disability resulting from a car accident) are excluded from the community of property regime. A testator or donor can also provide under an exclusion clause that an inheritance portion, legacy or donation is the heir's, legatee's or donee's private property, and therefore will not form part of the community of property.

A community of property is automatically dissolved if the marriage ends by death of one of the spouses or by divorce. Unless otherwise agreed, all property is divided equally. Entering into a community of property, either by marriage or as a result of the amendment of marriage conditions during the marriage, is not regarded as a gift that needs to be taken into consideration in determining the children's forced heirship rights.

### 2. Marriage Conditions

Spouses can agree upon marriage conditions (*huwelijksvoorwaarden*) before marriage. Marriage conditions must be incorporated in a notarial deed. During the marriage, marriage conditions can be made or amended. The spouses can freely negotiate marriage conditions and can, among other things:

- exclude any or some of the property from the community of property regime;
- insert a periodical settlement clause regarding the income that remains after the household expenses are paid; and/or
- agree on a final settlement clause, according to which, at the end of the marriage by divorce and/or death, property is administered as if the spouses were subject to full community of property. (the Dutch Civil Code contains general rules regarding settlement clauses in marriage conditions.)

### 3. Same-Sex Couples

Same-sex couples can enter into a marriage or registered civil partnership (*geregistreerd partnerschap*). In relation to property law, succession law and tax law, same-sex couples are treated in exactly the same way as heterosexual couples. A registered civil partnership enjoys the same legal treatment as marriage for the purposes of property law. There are no special provisions in family law in relation to cohabitants.

### 4. Dutch International Matrimonial Property Law

The Netherlands, France and Luxembourg have ratified the HCCH Convention on the Law applicable to Matrimonial Property Regimes (Hague Matrimonial Property Regimes Convention 1978). The Convention entered into force on 1 September 1992. The Convention applies only to the matrimonial property regime of couples that were married after 1 September 1992 or that have designated the applicable law to their matrimonial property regime after that date, even if they were married before then.

The Convention's main rule is that the spouses are free to designate the law applicable to their matrimonial property regime. The rules of the Convention that apply if no designation has been made are the following: the principle rule is that the law of the state in which both spouses established their first habitual residence after marriage governs the proprietary consequences of the marriage. However, under certain circumstances the law of the state of which both spouses are nationals at the time of their marriage prevails. These circumstances are where:

- the state of the common nationality of the spouses has made a declaration in accordance with the Convention's rules that it is a nationality state. The Netherlands has made such a declaration; France and Luxembourg have not. However, if such spouses have had their habitual residence in an habitual residence state for five years before their marriage, the law of that state will be applicable;
- the state of which both spouses are nationals has not ratified the Convention and is a nationality state, and the spouses take their habitual residence there; or
- the spouses do not establish their habitual residence in the same state shortly after marriage.

If the spouses do not have a common nationality and do not establish a common habitual residence in one state shortly after marriage, the law of the state with which the matrimonial property regime is most closely connected applies.

The rule is that the applicable law at the beginning of the marriage does not change automatically during marriage. There are exceptions to this rule. The most important exception is that, if the spouses have neither designated the applicable law nor made a marriage contract, the applicable law changes when the spouses have had their habitual residence in a state for a period of ten years.

#### D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

In the case of property that is commonly owned by two or more owners a vesting or take-over-clause can be agreed upon between the co-owners. As a result of such a clause, upon the death of one of the owners, the other owners acquire or have the right to take over the deceased's share in the common property. A vesting or take over clause may stipulate that the other owners are compelled to compensate the deceased's estate.

As a result of a death under a life insurance agreement or any third party insurance, a beneficiary can acquire an endowment insurance or a life annuity.

### III. Trusts, Foundations, and Other Planning Structures

#### A. Common Techniques

The Netherlands is a civil law jurisdiction. Statutory law constitutes the most important source of Dutch law. The courts, however, also play an important role in the formation of law. The trust concept is not known in Dutch law. However, the Convention on the law applicable to trusts and on their recognition of 1 July 1985 came into effect in the Netherlands on 1 February 1996. This means that the Netherlands recognises trusts insofar as they fall within the description of trusts given by the Convention.

Foundations are forms mainly associated with activities other than businesses, e.g. charitable, cultural, social activities and the like. Foundations are recognized in The Netherlands. This applies also for foundations governed by another jurisdiction's laws. A foundation under Dutch law (*stichting*) is a legal entity under Dutch law with two main characteristics:

- a foundation does not have any members or shareholders;

- the foundation aims at realizing a goal, as defined in its articles of association, by using capital designated for that purpose.

A foundation may stipulate its own goal (as long as such goal does not contravene the law). Its goal is not necessarily limited to charitable purposes and may also include commercial activities. The foundation being a legal entity of its own means that, in principle, the liability of persons involved with it (as board members or otherwise) is limited.

A foundation is to be incorporated through the execution of a notarial deed by a Dutch civil law notary, which deed must contain the articles of association of the foundation. The foundation and its board members must be registered with the Trade Register of the Dutch Chamber of Commerce.

The foundation is a rather flexible structure, mainly for the following reasons:

- the only mandatory corporate body of a foundation is its board. The articles of association must provide for the appointment and dismissal of the board members. There are no requirements, however, as to the manner of providing for appointment and dismissal (unlike, for instance, in respect of a private company, where the board members must be appointed by the general meeting of shareholders, or in specific cases by the supervisory board);
- several types of board members may be created, with varying representation powers;
- apart from the board the articles of association may define other corporate bodies, with specific powers within the foundation (such as a supervisory board), to be defined in its articles of association;
- there is no requirement for the Dutch Ministry of Justice to approve the articles of association as a condition to incorporation;
- in addition, a number of capitalisation, auditing and publication requirements do not apply to a foundation as it applies to a company.

When considering a foundation, one should bear in mind that pursuant to statutory law a foundation (i) may not make distributions to its incorporator(s) and the members of its corporate bodies and (ii) may only make distributions to other persons if such distributions are of an ideal or social nature. These restrictions pertain to the distributions of profits, capital or reserves. They do not prevent the foundation from entering into contracts with such persons, pursuant to which it needs to make payments.

In the Netherlands, foundations are often used as trust office (*administratiekantoor*). When used as trust office, goods (for example shares in a company or an art collection) are transferred to the foundation, against the issuance by the foundation of depository receipts (*certificaten*). By doing so, a distinction is made between the legal title and interest (*juridische gerechtigdheid*) to those goods, and the beneficial title and interest (*economische gerechtigdheid*) to the good concerned. Dutch law does not contain any specific provisions in this respect. General contract law does however apply. The relationship between the trust office and the depository receipt holders is governed by the provisions according to which the depository receipts are issued. These provisions are called the trust conditions (*administratievoorwaarden*) and may be agreed upon by the transferee of the goods concerned, the foundation and the depository receipt holder.

The issuance of depository receipts is often used to safeguard continuity within a company. A shareholder in a private limited company can convert his voting shares into non-voting depository receipts with the voting power accumulating to the board of the foundation. Usually the shareholder or any person(s) designated by him will acquire control in the board. Consequently, the depository receipts are transferred to the next generation, if so desired, under further terms and conditions (such as a guardianship to a certain age). Any future dividends or other payments on shares and increase in value

will accrue to the depository receipts holders without any gift or estate tax being due. By making specific arrangements regarding the constitution of the board once the shareholder has resigned, the shareholder can strengthen the continuity and the independence of the (family) enterprise.

#### B. Fiduciary Duties (Trustees, Board Members, Directors, etc.)

Board members of a foundation have the duty of care and the duty of good faith. In the Netherlands, the duty of care entails the duty to 'properly perform' management duties. A breach of these duties may give rise to an action by the foundation or give grounds for a successful appeal on tort (*onrechtmatige daad*). The duty of good faith is part of the reasonableness and fairness requirement that Dutch law imposes on the relationship between the foundation and its board members.

Regardless of the allocation of tasks, board members are collectively responsible for proper management. All board members will be jointly and severally liable for failure of one or more co-board members. An individual board member is only exempted from liability if he proves that he cannot be held seriously culpable for the mismanagement and that he has not been negligent in preventing the consequences of the mismanagement.

#### C. Treatment of Foreign Trusts and Foundations

The Netherlands does not have trust law. However, it is party to the HCCH Convention on the Law Applicable to Trusts and on their Recognition 1985 (Hague Trusts Convention). The Netherlands recognizes trusts governed by another jurisdiction's laws, if they were created according to the rules of the Convention. A foreign trust is governed by the applicable law. If no applicable law has been chosen, a trust must be governed by the law with which it has the closest connection.

In general, trust assets are not affected by succession and forced heirship rules. However, it is theoretically possible that the settlement of assets into trust is seen as a gift that harms forced heirship entitlements. This could result in a claim of a forced heir to the trust assets. Under the Convention on the law applicable to trusts and on their recognition, a trust may not need to be recognized if it harms forced heirship entitlements.

Dutch law follows the incorporation theory (*incorporatieleer*). Under the incorporation theory a legal entity is always governed by the laws of the state in which it is incorporation and has its statutory seat (this in contrast with the 'siège reel'-theory, under which the place where the legal entity's judicial and economic integration is situated is decisive). Foreign foundations can therefore operate in the Netherlands under their own national laws.

### IV. Taxation

#### A. Domicile and Residency

In the Netherlands there is no concept of domicile. Residence is important for tax purposes. Residence is to be determined "according to the circumstances." The decisive factor for determining residence is the taxpayer's centre of vital interests. That is the country where his closest economic and family relationships are located. Under case law, the following circumstances are considered particularly relevant: the availability of a permanent home, the place where the spouse and children live, and the location of the individual's personal and economic relations (e.g. the place of employment). Resident individuals are subject to tax on their worldwide income. Non-resident individuals pay tax on domestic income.

## B. Gift, Estate, and Inheritance Taxes

### 1. Inheritance Tax

Inheritance tax is payable on the worldwide property of a deceased who is (deemed to be) a resident of the Netherlands at the time of his death (in relation to residence, see § IV.A). A person who dies within ten years after leaving the Netherlands is deemed resident in the Netherlands if he still was a Dutch national at the time of his emigration and of his death.

### 2. Gift Tax

Gift tax is levied on gifts from a donor who is (deemed to be) a resident in the Netherlands. A person who leaves the Netherlands is deemed resident ten years after leaving the Netherlands if he still was a Dutch national at the time of his emigration and of the gift. If a non-Dutch national leaves the Netherlands, he is deemed to be tax resident for the following year, for gift tax purposes only.

### 3. Calculation of Inheritance and Gift Tax

Inheritance tax is not only due on what is acquired directly from an estate. The Inheritance Tax Act 1956 ("ITA 1956") includes various (fiction) provisions to prevent tax avoidance by transactions during a lifetime. For calculation of inheritance and gift tax, assets are valued at fair market value at the time of death or of the gift. In respect to some specific properties, the ITA 1956 provides for special valuation rules.

Inheritance and gift taxes are imposed at a progressive rate, depending on both the size of the acquisition and the relation between the deceased and the beneficiary. The following rates apply, depending on the beneficiary:

- 10% to 20% for transfers to spouses, cohabitants and children.
- 18% to 36% for transfers to descendants in the second or further degree (for example, grandchildren).
- 30% to 40% for transfers to parents, brothers and sisters, and non-related persons.

### 4. Tax-Free Allowances

For inheritance tax, the most important tax-free allowances are (in 2011):

- For partners, €603,600. Deducted from this amount is half of the cash value of pension rights derived by a partner from the death of the deceased. However, a minimum allowance of €155,930 always remains. Any inheritance of pension rights or certain annuities comparable to pension rights is exempt from inheritance tax. Besides spouses and registered partners, cohabitants may also qualify for partnership within the ITA 1956 if they meet several requirements.
- €57,342 for children whose cost of living were for the greatest part paid by the deceased and for whom it is expected that within the coming three years they will not be able earn half of the income a physically and mentally healthy person would earn.
- For other children and grandchildren: € 19,119.
- For parents: €19,119.
- For others: €2,012.

For gift tax, the following annual tax-free allowances apply (in 2011):

- For children: EUR 5,030.
- For others: EUR 2,012.

#### 5. Other Inheritance Tax and Gift Tax Exemptions

Subject to satisfaction of strict conditions, the following inheritance tax and gift tax characteristics apply to entrepreneurial assets and substantial shareholdings that represent entrepreneurial assets:

- the difference between the liquidation value of a business and the value as a going concern can be tax exempt conditionally;
- the first €1.006.000 of the value as a going concern and 83% of the excess above the first €1.006.000 of the value as a going concern can be tax exempt conditionally; and
- for the tax on the remaining 17% of the value as a going concern, a conditional extension for payment for a period of ten years can be obtained.

The main condition is that the business must be continued for a period of five years after the gift or death of the deceased. Transfers to designated charitable organizations are exempt from inheritance tax and gift tax.

The acquisition of Dutch real estate from both non-resident and resident donors, is subject to 6% real estate transfer tax (*overdrachtsbelasting*). For the period between June 15, 2011 and July 1, 2012 the transfer tax rate is lowered from 6% to 2% for the acquisition of dwellings. It is not relevant whether the dwelling is held for private use or as investment. For resident donees it is possible to (partially) offset the real estate transfer tax against the gift tax. If a non-resident taxpayer transfers immovable property as a gift, no gift tax is due. However the acquisition of such immovable property is taxable for real estate transfer tax purposes. No inheritance tax is payable on a non-resident's immovable assets that are situated in the Netherlands. A resident's worldwide property is subject to inheritance tax. If Dutch real estate is acquired by way of inheritance, this is not considered taxable for Dutch real estate transfer tax purposes.

#### 6. Taxation of the Assets of a Trust or Foundation

As mentioned before, The Netherlands does not have trust law. However, for income and inheritance and gift tax purposes, the tax treatment of (foreign) trusts and trust-like entities is regulated (see below under personal income tax).

#### 7. Inheritance Tax and Gift Tax Double Tax Treaties

In relation to inheritance tax, The Netherlands has entered into seven double taxation treaties, with Austria, Finland, Israel, Sweden, Switzerland, the UK and the US. In relation to gift tax, The Netherlands has entered into treaties with Austria and the UK.

#### 8. Tax Assessment

The deadline for filing the inheritance tax return is eight months after the deceased's death. Postponement is granted on request. The tax must be paid within six weeks after a notice of assessment.

If an heir or legatee living abroad receives property from a Dutch resident's estate, the heirs who live in The Netherlands are liable for the payment of the non-resident heir's or legatee's taxes.

Declarations for gift tax must be filed within a period no more than two months from the gift. An exception applies in respect of gifts by parents to children. In these cases the filing deadline ends two months after the end of the calendar year in which the gift was made.

### C. Taxes on Income and Capital

The direct taxes on income levied in The Netherlands are corporate income tax and personal income tax. There is no wealth tax as such. Wealth tax is considered to be included in Box 3 of personal income tax. There is no separate capital gains tax in The Netherlands, however for corporate income tax and income from business activities and income from substantial shareholdings (personal income tax) the capital gains may be taxable.

#### 1. Corporate Income Tax

Corporate income tax is levied on entities specified in the Corporate Income Tax Act. Examples are public companies with limited liability, private companies with limited liability, limited partnerships with open end and cooperatives. These entities are deemed to run a business with all their assets. Associations/foundations are subject to corporate income tax insofar as they run a business or (potentially) compete with other business.

Non-resident entities are taxable in The Netherlands to the extent that they derive income from certain Dutch sources (permanent establishment and Dutch real estate). Resident entities are subject to tax on their worldwide profits.

The Dutch corporate income tax rate is 25%. For profits below EUR 200.000, a 20% rate applies.

Revenue generated through a foreign permanent establishment are included in the Dutch corporate income tax base. Up until 2011, a credit will be granted for foreign taxes. In this system, losses of foreign permanent establishments can in principle be directly offset against Dutch profits. An object-based exemption for foreign permanent establishments is proposed for 2012. This will provide that losses incurred through foreign permanent establishments will be offset against Dutch profits. The proposed object-based exemption will not apply to so-called 'passive foreign portfolio investment branches.'

#### 2. Personal Income Tax

Resident individuals are subject to tax on their worldwide income. There are three categories or 'Boxes' of income. The tax rates vary, depending on the category. Deductible amounts like interest are generally assigned to the same box as the income to which they are related. Certain personal allowances are deductible in Box 1, Box 3 or Box 2 (in this order) if the income from the preceding box is not sufficient for deduction. These allowances are: alimony, losses on loans granted to starting entrepreneurs, childcare expenses, medical expenses, maintenance costs for historic monuments, and gifts. Partners (spouses, registered partners, and certain cohabitants) are in principle taxed individually. However, there are also categories of joint income and deductible expenditure. Partners can apportion this joint income and deductible expenditure among themselves and as such choose the most beneficial apportionment between the two of them.

Married persons or persons that have entered into a registered partnership recorded in the municipal register of births, deaths, and marriages automatically qualify as partners (except if they are permanently separated). Persons living together without being married can qualify as partners for tax purposes if they meet specific conditions.

If a person lives in The Netherlands, that person will generally be subject to the Dutch compulsory social security system. This system comprises the General Old Age Pension (AOW), Surviving Dependents (ANW) child benefit, and Exceptional Medical Expenses (AWBZ) schemes. Contributions to these insurance schemes are charged on earnings. The contributions are finally collected via the annual Dutch

income tax assessment. Social security contributions are only calculated on the first two brackets in Box 1.

The Netherlands grants levy rebates (*heffingskortingen*). The most important levy rebates are the general levy rebate granted to all resident taxpayers of (in general) €1,987 (2011 amount) and the employment levy rebate granted to resident, employed taxpayers of (in general) €1,574 (2011 amount).

#### Box 1: income from employment and dwellings

In this Box, the following categories of income are taxed:

1. income from business activities;
2. income from present and past employment;
3. income from other activities that cannot be qualified as business activities or employment (any freelance activity; for example, occasional lecturing and consultancy work);
4. periodical payments received from individuals (for example, alimony) or insurance companies (for example, a pension);
5. periodical payments received from the state or a public body (for example, the state pension); and
6. income from owner-occupied dwellings.

Income in this category is subject to tax at progressive rates ranging from 1.85% to 52%. In addition, income from employment is generally subject to wage withholding tax. Wage withholding tax can be offset against personal income tax. In Box 1, only a limited number of deductions are allowed, the most important being interest paid on a loan contracted for the acquisition, improvement, and maintenance of the principal, owner-occupied residence. The interest paid on such loan can in principle be deducted for a period of 30 years.

Income from business activities includes capital gains. Gains resulting from the normal administration of private wealth consisting of immovable property (including dwellings) are generally tax free, unless they result from activities going beyond normal property management.

Emigrating individuals who have paid annuity or pension premiums will receive a protective tax assessment that is not collected in advance. The taxpayer must provide security if he emigrates outside the European Economic Area (EEA). The tax is triggered if the taxpayer transfers the annuity policy for a profit or gives security over the policy or receives a lump-sum pension payment within ten years following the individual's exit.

Emigrating individuals may also be confronted with exit taxes in the case of a capital sum insurance for the owner occupied dwelling.

#### Box 2: income from substantial shareholdings

Income from a substantial shareholding (that is, at least 5%) includes dividends and capital gains, and is taxed at a flat rate of 25%. For non-resident taxpayers this box only applies to shares held in resident companies. Dividends received from a substantial shareholding are taxed on a cash basis when they are received and capital gains on a substantial shareholding are taxed in the year of the disposal.

Dividends paid by resident companies are subject to a 15% dividend withholding tax. This withholding tax may be offset against Dutch income tax by resident taxpayers.

Emigrating individuals with a substantial shareholding in a corporate body are deemed to dispose of their shareholding. This deemed disposition is provisionally subject to 25% tax on capital gains on the shareholding. The emigrating individual will receive a protective tax assessment that is not collected in advance. The taxpayer must provide security if he emigrates outside the EEA. The assessment will be collected if, inter alia, the individual disposes (partially) of the shareholding within ten years following the individual's exit. If the shareholding value decreases after the individual's exit, the tax rate is reduced by 25% of the amount the share value has decreased. Upon the end of the ten year period, the (remaining amount of) protective tax assessment will be remitted.

#### Box 3: income from savings and investments

Property and assets in this category are deemed to produce a net yield of 4% per year of their actual value. Assets and debts are valued on 1 January of that year. The net yield is taxed at a flat rate of 30%. This translates into an annual tax of 1.2% on the actual value of the capital assets. The income tax cannot be negative (for example, where liabilities exceed assets). Assets include all tangible and intangible assets. Second houses are also subject to taxation in Box 3. Excluded from the yield assessment base is movable property used for personal use (e.g. cars, yachts, art collections), unless such property is mainly held as an investment.

Certain approved investments and monies below a certain value may be excluded from the yield investment base. The first €20,785 of the assessment base is tax-free. These exemptions apply per person. A (married) couple together therefore is eligible for a double exemption.

For non-resident taxpayers taxation in Box 3 is limited to Dutch real estate and direct or indirect rights therein.

### 3. Taxation of the Assets of a Trust or Foundation

The Netherlands does not have trust law. However, the law on income tax and the law on inheritance tax regulate the tax treatment of (foreign) trusts and trust-like entities. A private foundation, stiftung or treuhand are considered an equivalent structure to a trust. The transfers of assets to a trust can be tax-free since for tax purposes such transfer is deemed not to have taken place and therefore no taxable event has occurred. The assets of a trust are attributed to the settlor for tax purposes and income taxes are levied on the settlor (or his heirs after his death). Exceptions apply if, for example, a beneficiary has a fixed interest. In such case the beneficiary himself is taxable on the fixed interest. The value of such interest is generally taxed in Box 3. The attribution rules do not apply to such fixed interest.

In relation to payments made from the (foreign) trust to beneficiaries, other than the settlor, gift tax is assessed on payments when the settlor is (deemed) resident in The Netherlands. The beneficiaries must also pay inheritance tax on trust assets upon the settlor's death, if the settlor was a resident.

### 4. Non-Residents

Non-resident individuals pay tax on domestic income. Generally speaking this consists of income from substantial shareholdings held in resident companies (Box 2 above) and/or Dutch real estate and direct or indirect rights therein (Box 3 above). There is no tax-free base in Box 3 for non-residents.

Non-residents may opt for treatment as resident taxpayers, provided they are resident of an EU Member State or of a country designated by the Ministry of Finance. Opting for resident taxpayer treatment may be especially favourable for foreign employees working in The Netherlands, as the interest paid on loans contracted for purchase, renovation or maintenance of a main residence in the state of actual residence will be deductible from Dutch earnings.

## 5. Temporary Residents

Employees who are temporarily assigned in The Netherlands from abroad are known as extraterritorial employees. If these employees meet certain conditions, they are eligible for a special expense allowance scheme of 30%. Under this facility, 30% of the wages may be received tax-free as a compensation for the additional costs of the employee's temporary stay in The Netherlands.

The employee must have a specific expertise that is rare in the domestic labor market or must be part of a job rotation scheme. The preferential tax regime is available for 120 months, starting from the date of employment in The Netherlands, if the employee has started before 2012. From January 1<sup>st</sup> 2012 the preferential tax regime will be available for 96 months. The same rule applies if a non-resident taxpayer is hired and based abroad while working for an employer based in The Netherlands. Taxpayers benefiting from the 30% facility that reside in The Netherlands have the additional benefit that they may opt to be taxed as non-resident taxpayers for boxes 2 and 3 of Dutch income tax. Generally speaking this implies that they will not be taxed on substantial shareholdings in foreign body corporates and savings and investment. Investment in Dutch real estate will remain taxable in Box 3.

## 6. Tax Assessment

The official income tax year for individuals runs from 1 January to 31 December.

Taxpayers must file their tax declaration before 1 April in the assessment year. The assessment year is the calendar year following the tax year (for example, for the tax year 2011, taxpayers must file tax declarations before 1 April 2012).

Postponement is possible on request. However, the final assessment must be issued within three years from the end of the tax year concerned. The tax must be paid within six weeks of notice of the assessment.

## 7. Double Taxation Treaties

In relation to corporate income tax and personal income tax, The Netherlands has entered into many double taxation treaties, for example with Belgium, China, Switzerland, the UK and the US. Tax treaties override domestic law. Under most tax treaties concluded by The Netherlands, double taxation is generally avoided by the exemption with progression method. The relief is granted by reducing the tax amount by a percentage equal to the percentage that the foreign-source income bears to worldwide income. However, the credit method generally applies to withholding tax on dividends, interest and royalties (that is, the individual is taxed in both states but the state of residence gives credit for the tax paid in the other state).

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