

Memorandum

Taxation of the Dutch Cooperative



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1. Why choose for a Dutch cooperative

The Dutch cooperative has a long tradition in the agricultural (bank) sector in the Netherlands. Nowadays the Dutch cooperative is used more and more as a holding company in active investment structures because of the possibility to repatriate dividends to its parent company (which are called members) without any Dutch dividend withholding tax.

Also, the Dutch cooperative can prove to be an attractive vehicle in private equity structures, not in the least because the Dutch tax authorities are willing under certain circumstances to issue a tax ruling, which ensures the tax treatment for the cooperative and its members.

In this memo we describe the tax advantages of using a cooperative, more specifically the tax treatment of the cooperative and its members, international tax aspects and the possibility to ensure the tax treatment of the members of the cooperative by negotiating Advance Tax Agreements with the Dutch tax authorities, are discussed.



2. Tax aspects of the cooperative

2.1 Corporate income tax position of the cooperative

The cooperative is regarded as an entity for Dutch Corporate Income Tax purposes and is subject to corporate income tax, similar to a NV or a BV. The cooperative can apply the Dutch participation exemption on a qualifying participation and apply for other facilities, such as the Dutch fiscal unity regime. Since the cooperative is subject to corporate income tax, it can be considered as a tax resident for treaty purposes, which enables the cooperative to use the extensive network of Dutch tax treaties. Also, all European Directives (except for the EU Savings Directive and the EU Interest and Royalties Directive) apply to the cooperative, of which the use of the Parent-Subsidiary Directive will be the most important for the cooperative in international structures.

2.1.1 Participation exemption

As we noted before the cooperative can apply the participation exemption on dividends received or capital gains realized, provided that the requirements for the participation exemption are met.

The requirements for the current participation exemption are as follows:

1. A shareholding of at least 5% of the nominal value of the paid-up capital in a subsidiary that has a capital divided into shares, should be held;
2. The shareholding is not held in a so-called low taxed investment subsidiary;

A low taxed investment subsidiary is a subsidiary of which the assets consist directly or indirectly for more than 50% of non-business related investments (including group loans which are considered to be not-active), and which is not subject to a profit tax rate of at least 10% calculated using the Dutch standards. The shareholding in a participation whose assets consist for 90% or more of real estate, also qualifies for the participation exemption.



Under the Dutch participation exemption regime, both dividends and capital gains realized upon the alienation of a qualifying participation remain exempt from Dutch corporate income tax. The Dutch participation exemption does not have requirements regarding the minimum duration of the shareholding.

2.1.2 Fiscal Unity

It is possible for the cooperative to form a fiscal unity (a form of group taxation) for Dutch corporate income tax purposes with a BV/NV, in which the cooperative is the parent company.

Fiscal unities between cooperatives and fiscal unities with a BV/NV, as a parent company, holding a cooperative are possible as well.

For Dutch corporate income tax purposes a fiscal unity has as a consequence that the subsidiaries are absorbed by the parent company (consolidation) and can file one single corporate income tax return. A fiscal unity has as an advantage that assets and liabilities can be transferred within a fiscal unity without any corporate income tax consequence and that profits and losses of the members in the same financial year can be offset against each other.

The main conditions for a fiscal unity (“fiscale eenheid”) are:

- Each subsidiary must be at least 95% owned (legal and beneficial ownership of the shares) by the parent company, although the holding may be indirect through another Dutch company, provided the intermediary company also forms a part of the fiscal unity;
- The accounting period for all companies forming part of the fiscal unity must coincide;



- Both the parent company and the subsidiaries should have a certain legal form, such as the NV, BV, the cooperative or a similar foreign form;
- The companies involved must be subject to the same tax regime;
- The companies belonging to the fiscal unity must be resident for Dutch corporate income tax purposes, or in case of a foreign company a Dutch branch should be present, whose profit is taxable in the Netherlands.

If all conditions have been met a cooperative and its subsidiaries can form a fiscal unity.

A cooperative is often used in combination with a Dutch BV forming a fiscal unity, which fiscal unity holds foreign participations. The reason for this is that certain tax treaties require the existence of a BV, instead of a cooperative holding the foreign subsidiary directly, in order to apply reduced dividend withholding tax rates.

2.1.3 Taxation of Members of the cooperative

When discussing the tax treatment for members of a cooperative, we must first make a distinction between members that are private individuals and members that are entities.

This memorandum is limited to describing the tax consequences of being a member in a cooperative for entities.

The membership in a Dutch cooperative for a Dutch member will fall under the scope of the Dutch participation exemption. An interesting aspect of cooperatives is that a membership right is eligible for the participation exemption, even if the member has contributed less than 5% of the capital of the cooperative.

2.2 Liability for foreign members to Dutch corporate income tax

In case the member in the cooperative is a foreign entity, such entity could become liable for Dutch corporate income tax for the profits received from the cooperative on the basis of two stipulations of the Dutch corporate income tax:



- 1) The membership in the cooperative can be regarded as a share in the profit of an enterprise that has its effective management in the Netherlands and insofar that share in the profit cannot be regarded as derived from holding securities; or
- 2) The membership in the cooperative constitutes a substantial interest (entitles the member to 5% or more of the annual profit of the cooperative), the membership cannot be allocated to a (active) trade or business of the member and the main purpose of holding the substantial interest to avoid Dutch income tax or Dutch dividend withholding tax of another.

2.2.1 Membership is regarded as a share in a profit of a Dutch enterprise

Regarding the first stipulation we note that the Dutch Corporate Tax Act contains a fiction on the basis of which such a share in the profits is treated as a Dutch permanent establishment.

There are a number of arguments why we believe that the membership of a cooperative could not be regarded as a share in the profits of a Dutch business.

To avoid uncertainty regarding the deemed permanent establishment, which can give rise to Dutch corporate income taxation of the members, we usually request that the Dutch Tax Authority confirm beforehand that the fiction does not apply.

2.2.2 Membership is a taxable substantial interest

A substantial interest for Dutch corporate income tax purposes is present if a member is entitled to at least 5% of the annual profits of a cooperative or if he is entitled to at least 5% of the proceeds from the liquidation of a cooperative.

In order to avoid the Dutch taxation on the basis of a substantial interest being present, it is essential that the membership in the cooperative can be allocated to an (active) trade or business of the member. Also, the main purpose of holding the substantial interest cannot be to avoid Dutch income tax or Dutch dividend withholding tax of another.



However, please be aware the members resident in a country which has concluded a tax treaty with the Netherlands will usually not be subject to tax on gains deriving from their membership of the cooperative. The reason for this is that the tax treaty will usually (but not always) allocate the right to tax the gain to the member's country of residence.

In cases where the member is not located in a treaty country, it is highly recommended that an Advance Tax Ruling (ATR) with the Dutch tax authorities is agreed. An ATR will often be possible in case of non-passive structures, where the membership will be considered as part of the business asset of the member.

The ATR will only be granted if the cooperative is part of an active structure. This means that the members of the cooperative must demonstrate that they have sufficient business involvement in the cooperative and that both the subsidiaries of the cooperative run an active business and the members itself run an active business. To demonstrate an active business run by the members of the cooperative, the members of the cooperative can be appointed part of the supervisory board and must carry out actual management activities with regard to the business operation of the subsidiaries. In cases where the members of the cooperative hire the active management from a related party, this is also regarded as being active themselves.

2.3 Dutch dividend withholding tax

As noted above, the most attractive feature of the cooperative is that profit distributions made by a cooperative are not considered a distribution of dividends according to the Dutch Dividend withholding tax act. Hence, no Dutch withholding tax is levied on the distributions of the cooperative.

The reason for this is that the Dutch cooperative is not an entity, which has a capital divided into shares and is therefore not mentioned in the Dutch dividend withholding tax act.



In tax literature there is some debate whether the cooperative could be regarded as being similar to a BV or an NV, especially in cases where the articles of association of the cooperative bear great similarities with the articles of association of an NV or a BV. Consequently, the cooperative could - theoretically speaking - fall under the scope of the Dutch dividend withholding tax.

In view of the above debate and although the arguments to subject the cooperative to Dutch dividend withholding tax are not very strong, the issue is usually resolved by requesting the tax authorities to confirm in an ATR that no Dutch dividend withholding tax is due.

2.3.1 new anti- abuse rules as from January 1, 2012

As from January 2012, new anti abuse rules have entered into force with respect to dividend distributions made by a cooperative. The new rules are in line with the Dutch ruling policy and do not introduce a regime change of the Dutch tax authorities.

Based on a new article in the dividend withholding tax act, profit distributions made by a cooperative may fall within the scope of this act. If a cooperative holds directly or indirectly shares with the main purpose (or one of the main purposes) to avoid dividend withholding tax or foreign tax and the membership right in the cooperative cannot be allocated to an (active) trade or business carried on by that particular member, dividend withholding tax at a rate of 15% applies. Please bear in mind that in case a tax treaty is applicable in order to avoid double taxation, dividend withholding tax might be lowered.

2.4 ATR: advance tax ruling by the Dutch tax authorities

The Dutch tax authorities are willing to confirm in an ATR that:

- No Dutch dividend withholding tax is levied on distributions made by the cooperative.
- The participation exemption applies to the investments of the cooperative.



- The foreign members of the cooperative are not liable for Dutch corporate income tax on the basis of their membership right.

The policy of the Dutch tax authorities is that all relevant facts and circumstances have to be provided, as well as the identity of the members and the ultimate beneficiaries of the structure.

The Dutch tax authorities will only give their confirmation regarding the members of the cooperative not being taxable as foreign taxpayers in the Netherlands, if it can be demonstrated that an active structure is in place.

Also, the Dutch tax authorities will not cooperate in cases where an existing Dutch dividend withholding tax claim exists. Therefore, transforming a Dutch BV or NV into a cooperative is not possible, without running the risk that adverse Dutch tax consequences are triggered.

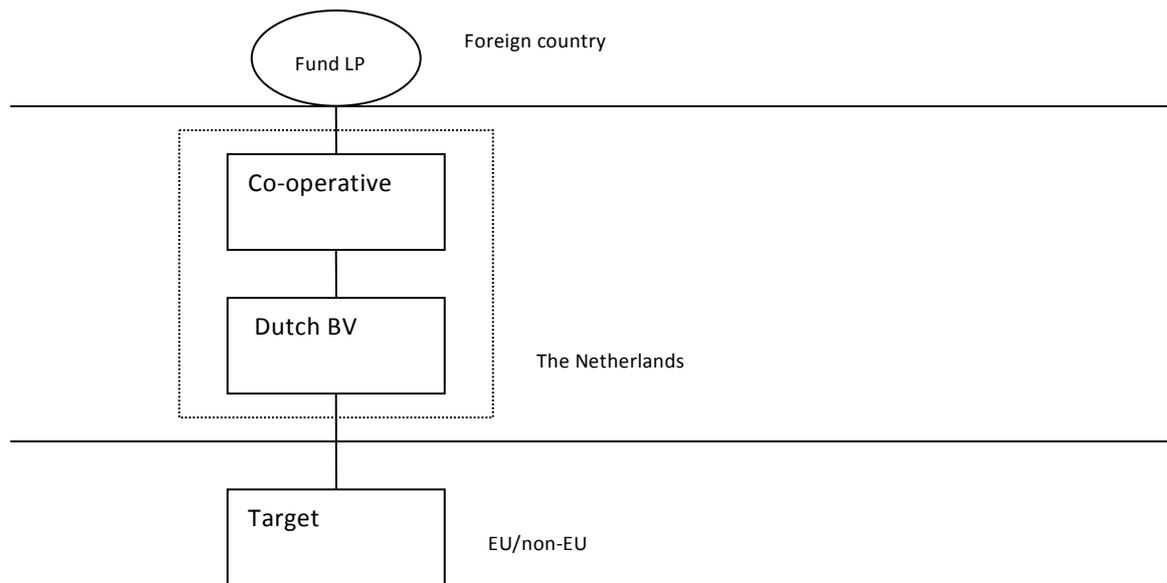
The Dutch tax authorities have specific requirements regarding the wording of the articles of association of the cooperative, which we would be happy to explain to you in more detail.

Finally, in cases where the Dutch cooperative or its subsidiaries carry out other activities than the holding and managing of subsidiaries, for example finance activities, the ATR will be issued on the condition that an Advance Pricing Agreement is negotiated covering the “at arm’s length aspects” of these activities.



2.5 Examples of international structure

We have hereunder depicted an example of a structure in which a cooperative is used.





3. Legal aspects of the cooperative

3.1 Incorporation and aim

The cooperative is a legal entity and therefore has legal personality under Dutch company law. Being a legal entity, the cooperative can own assets, can incur liabilities and is capable of suing and being sued in its own name. Also, because of the legal personality of the cooperative, the entry and exit of members has no direct consequences for the assets held by the cooperative.

Contrary to the BV and NV (the Netherlands limited and public liability companies), most of the stipulations for associations do apply on cooperatives. The cooperative has to be incorporated before a Dutch notary. The notarial deed contains the articles of association of the cooperative.

The corporate seat must be located in the Netherlands. Furthermore the objects clause in the articles of association must state that the aim of the cooperative is to provide for specific material needs of its members by entering into agreements with them (which may not be insurance agreements). Furthermore the cooperative should carry out a business on behalf of the members to meet the requirement as described above.

Contrary to an ordinary association, however, a cooperative is allowed to make profits for distribution to its members. Compared to a BV or an NV, the requirements for establishing a cooperative are minimal. For instance, a Declaration of “No Objection” from the Ministry of Justice is not required. This makes it possible for the cooperative to be established in a matter of days. The cooperative must be registered with the Trade Register run by the Chamber of Commerce.

3.2 Members

Cooperatives have to be incorporated by at least two members. It is believed, however, that a cooperative can continue to validly exist with a single member. Unless the articles of association provide for this, memberships of a cooperative cannot be transferred. However, members can freely surrender their membership. For tax purposes, the



articles of association must contain a provision which states that new members only can be admitted, provided that all other members approve the admission.

Members must each have at least one vote in the general meeting of members.

3.3 Capital and liability

As opposed to a BV and an NV, cooperatives do not have a minimum capital, which makes the cooperative more flexible than a BV or NV. If the articles of association provide a limitation or exclusion of liability, the name of the cooperative must contain the characters “BA” (if liability is limited) or “UA” (if liability is excluded). If the liability is not excluded or limited, the name of the cooperative must contain the letters “WA” (personal liability).

Cooperatives are required to publish an annual account and an annual report. (The cooperative has no legal requirements to distribute (accumulated) income to its members).

3.4 Managing Board and General Meeting of Members

The main governing bodies of a cooperative are the Managing Board and the General Meeting of Members. The Managing Board can be appointed and dismissed by the General Meeting of Members. The cooperative may also have a Supervisory Board and/or other bodies.

The Managing Board manages the cooperative. Directors on the Managing Board can be either natural persons or legal entities. The Managing Board decides on the admission of members to the cooperative, the suspension of membership rights and the termination of membership. The articles of association can, however, contain other arrangements. In order to be able to benefit from the favourable tax features of a cooperative, the admission of new members and the transfer of membership interests by members are subject to certain limitations as described above.



4. Conclusion international tax treatment of members

The cooperative is often used in international structures, because of the absence of dividend withholding tax on profit distributions made to its non-resident corporate members. Due to the fact that the cooperative or the cooperative in combination with the BV have access to the tax treaties and the EU Directives, it is possible to receive dividends from the target company without dividend withholding tax being levied.

The attractiveness of a Dutch cooperative can also lie in the fact that in some jurisdictions (like the UK) the cooperative is regarded as a transparent entity for tax purposes.

While we note that for US tax purposes, the cooperative, which has excluded all liability for its members in its articles of association, is regarded to be a corporation.

In order for the structure to work, it is essential that the foreign member is not liable to any Dutch corporate income tax as a result of its membership in the cooperative. For this purpose it is advisable to apply for an ATR with the Dutch tax authorities.

Since the Dutch tax authorities are only willing to issue the tax ruling provided that the cooperative has certain civil law features, close attention should be paid when drafting the articles of association.

Blue Clue Tax Solutions would be very happy to assist you further in setting up a Dutch cooperative. Please do not hesitate to contact Ton Krol (tkrol@blueclue.nl).

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