

Netherlands

Legal overview

Executive Summary

The Netherlands consistently ranks among the world's most competitive industrialized economies, offering an attractive business and investment climate.

The most commonly used entities for setting up a business in The Netherlands are the public limited liability company (naamloze vennootschap or 'NV') and the private limited liability company (besloten vennootschap met beperkte aansprakelijkheid or 'BV').

The incorporation of the NV or BV is, in general, a swift procedure that requires the involvement of a civil law notary.

The NV

Contrary to the BV, which is privately owned, the NV is primarily designed as a public company (comparable to the 'public limited company' (plc) in the United Kingdom or 'Aktiengesellschaft' (AG) in Germany) the shares of which can be listed on a stock exchange.

A NV is subject to capital protection rules, such as the requirement of minimum capital (EUR 45,000) and formalities on the payment of shares, share buybacks, financial assistance and the distribution of dividends and reserves.

By law, certain matters are solely within the authority of the General Meeting, such as the appointment, suspension and removal of Managing Directors and Supervisory Directors, amendments to the Articles of Association, the adoption of the annual accounts, and the voluntary liquidation of the company.

Large companies may be subject to the 'Large Company regime' in which case a Supervisory Board is mandatory which shall have special powers to appoint the Managing Directors. For some groups of companies for example, holding companies or companies with a majority of the employees working outside the Netherlands the Large Company regime provides less restrictive rules.

The BV

A BV is privately owned (i.e. with a closed circle of shareholders) and is frequently used for tax structuring and financing purposes and for setting up group holdings and joint ventures.

A BV is designed to be a flexible instrument with very limited rules on capital protection (no minimum capital is required) and with the possibility to incorporate detailed shareholders' arrangements in the Articles of Association. Different classes of shares are possible to vary the voting rights of shareholders and their dividend rights. It is also possible to issue non-voting shares to shareholders.

The General Meeting decides on profit distribution, based on the company's accounts drafted by the Management Board. Dependent on the outcome of a balance and liquidity test, the Management Board may refuse approval to the distribution of profit, if this contribution might threaten the continuity of the company.

Financing of a Company

Companies are financed in a number of ways:

- equity: capital contribution from shareholders to the company against issuance of shares or by contributing capital by way of share premium (agio)
- debt: loan and bank finance; and
- hybrid securities: combining both equity and debt characteristics (for instance a convertible loan/bond).

Corporate Insolvency

Any company can be declared bankrupt by the district court, as long as the company has the center of its interests in the Netherlands. Applications for bankruptcy can be filed by: (i) the company itself, (ii) a creditor, (iii) or the public prosecutor.

If the petition is granted, the district court will declare the debtor bankrupt and appoint one or more trustees (in Dutch: curator). The trustee is charged with the administration and liquidation of the bankruptcy estate.

As a general rule, the district court will only declare a debtor in state of bankruptcy if the debtor has ceased to pay. This is generally the case if various creditors have difficulty in collecting the debts owed by the company.

As a general principle of Dutch bankruptcy law all creditors have an equal right to payment and that the proceeds of the bankrupt party's estate will be distributed in proportion to the size of their claims (*paritas creditorum*). There are however two groups of preferred creditors to whom this principle does not apply:

- creditors who hold a secured interest (i.e. a mortgage or right of pledge); and
- creditors who have a preference by virtue of bankruptcy and other laws.

These preferred creditors may exclude the collateral from the bankrupt party's estate and foreclose their security.

Director's Liability in Bankruptcy

Each Managing Director is jointly and severally liable for the shortfall of the bankrupt estate of the company if the Management Board has evidently improperly performed its duties and the improper management was a contributing factor to bankruptcy.

An individual Managing Director can exculpate himself, if he proves that he has not been negligent insofar as the improper management is concerned and he has not acted negligently with regard to taking measures to prevent the consequences thereof.

In this regard the obligations of maintaining a proper administration and the obligation to prepare, adopt and publish annual accounts are quite important: if one of these obligations is neglected, two statutory presumptions apply: (i) an irrefutable presumption that the Managing Director has improperly performed his duties (ii) and a refutable presumption that the violation of these obligations was an important contributing factor to the bankruptcy. In order to defend himself against this refutable presumption, the Managing Director must give *prima facie* evidence that external factors other than improper management importantly contributed to the bankruptcy. Unless the trustee in bankruptcy can give *prima facie* evidence that the improper management was also an important cause of bankruptcy, the management is exonerated.

*Author: Ruud Voorvaart, Voorvaart Advokaten
voorvaart@voorvaartadvocaten.nl*

Contact:

Breda

Voorvaart Advocaten
Ruud Voorvaart
voorvaart@voorvaartadvocaten.nl
www.voorvaartadvocaten.nl

Tax overview

Company Registration

Every new business, whatever its legal form, must register with the Dutch Chamber of Commerce in the Netherlands. The Chamber of Commerce systems are automatically connected with the system of the Dutch tax authorities so that registration for tax purposes is automatic, except for wage tax which applies if the company intends to employ people. This registration has to be done separately with the tax authorities.

Setting-up taxation

There are no setting-up costs in terms of taxation in the Netherlands except for a small fee for registering the company in the Dutch Chamber of Commerce.

National current benefit taxation

Corporate income tax

The taxable profit is based on the accounting profit subject to certain adjustments. In addition, there are limited deductions for certain expenses. Furthermore, there are extensive rules limiting the deduction of interest paid. From 1 January 2019, a new rule limiting the deduction of interest has been introduced. In general net interest expenses in excess of EUR 1 million are non-deductible to the extent they exceed 30% of the EBITDA.

Taxable profits, including capital gains of both companies and branches doing business in the Netherlands are subject to 19% corporate income tax rate over the first EUR 200,000 of profit and 25% over the excess. These rates will be gradually lowered to 15% and 20,50% in 2021.

If a Dutch resident company holds 5% or more of the shares in a (foreign) company then the Dutch company will not be subject to tax on dividends received from its shareholding under the participation exemption, subject to certain conditions being met.

The Netherlands has developed tax facilities in order to stimulate innovative activities. If the company has opted for the innovation box, an effective 7% corporate income tax rate will apply to the earnings exceeding the production/development costs.

Trade tax (local profits tax)

There is no local profits tax in the Netherlands

Other taxes (VAT, property taxes)

VAT is levied at a standard rate of 21% for most goods. A reduced rate applies to food, books and certain other necessities. From 1 January 2019 the reduced rate has been increased from 6% to 9%. There is a zero rate for the export of goods. Certain medical services, banking services and school education are exempt from VAT.

VAT is charged on the transaction value. The tax collected by the business from its customers is paid to the tax authorities on the basis of a tax return, which is filed monthly, quarterly or annually. VAT charged to the business (and paid to other businesses) is deductible from the VAT payable to the authorities. A negative balance of these amounts is refunded. A foreign company may (under certain conditions) reclaim Dutch input VAT.

There is a transfer tax in the Netherlands of 2% on residential real estate and 6% on other real estate. If certain conditions are met on the inheritance of real estate, restructuring of a group and on transfers of real estate which take place less than six months after a previous transfer an exemption from transfer tax can apply. If VAT is charged on the transfer of real estate then often an exemption from transfer tax will also apply.

Treaties for the avoidance of double taxation

General rules

The Netherlands has a wide range of double tax treaties. There is no withholding tax on interest and royalties under domestic legislation.

Double-taxation treaties networks cover almost all the industrialised countries and many others. Apart from the number of treaties, the rates negotiated for withholding tax rates are often lower than other countries manage to obtain.

Benefit distribution (national withholding taxes, international tax exemption options)

The Netherlands levies a dividend withholding tax on profit distributions by resident companies. The Dutch dividend withholding tax rate is 15%. This rate may be reduced, often to 5% or to zero

on the basis of Dutch legislation, double tax treaties or the EU Parent-Subsidiary Directive.

A distribution of dividends by a Dutch company to a qualifying foreign corporate shareholder is exempt from dividend withholding tax if the shareholding is not held with the main objective or one of the main objectives to avoid taxation and the structure is not artificial.

Tax treatment of losses

Losses may be carried back one year and carried forward for six years (losses incurred before 2019 can be carried forward for nine years) subject to certain conditions. Restrictions apply to losses that are classified as holding and finance losses. These losses are only offsetable against holding and finance profits and are also subject to other conditions.

Furthermore, in the event of a major change of the ultimate shareholder, losses that have been incurred before the moment of the change cannot be offset against future profits unless certain tests are met.

Employer obligations (salary taxes, social security)

In general an employer is obliged to withhold wage tax and social security from payments to employees and to pay this to the tax authorities. Withholding and paying over the correct amount of wage tax is the responsibility of the employer.

Wage tax and social security are normally paid on a monthly basis prior to the end of the month after that in which the benefit or wages were received.

There are two types of social security contributions in the Netherlands. These are national insurances (for instance for state pensions) and employee insurances which insure employees against the loss of income if they become unemployed, disabled or ill.

National insurance contributions are withheld with the wage tax and paid by the employer, but on behalf of the employee.

Contributions with respect to the employee insurances are borne and paid by the employer.

Author: Eric Herkströter, Graham Smith & Partner

Contact:

Amsterdam

GRAHAM SMITH & PARTNERS
Hemonystraat 11, 1074 BK
Tél. +31 20 683 83 30
Fax +31 20 683 27 33
E-mail : advice@grahamsmith.com
Site web : www.grahamsmith.com
John GRAHAM - Jens LANGENDORFF