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A008 Cost plus ruling – Netherlands

- See paragraphs 41 to 44 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

A009 Resale minus ruling – Netherlands

- See paragraphs 41 to 44 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

A010 Intra-group financing – Netherlands

- See paragraphs 33 to 35 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

A014 Holding companies – Netherlands

- See paragraphs 45 to 51 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Legislative action to reinforce the anti-abuse provisions attached to the application of the participation exemption has been taken effective as of the beginning of 2002.

The anti-abuse provisions are primarily based on a distinction made between the passive or active character of the income derived from the participation (subsidiary or permanent establishment) held by a Dutch corporate taxpayer. The distinction is based on the application of article 13 paragraph 2 of the Corporate Income Tax Act and as further defined in relevant case law. Income falls within the category of passive income where it stems from a participation that is considered as a portfolio investment. The tests used for identifying such a portfolio investment are based on the link between the activities of the Dutch corporate taxpayer and its participation (e.g. lack of direct link) and the type of the activities of the participation (e.g. financial activities, portfolio management and other investment activities, or predominantly intra-group exploitation of tangible or intangible assets).

Under article 13 of the Corporate Income Tax Act, where income (dividend or capital gain) from the participation is passive in nature, the participation exemption does not apply and the income is taxable in the hands of the Dutch parent company. Where the applicable double tax treaty so provides, a foreign tax credit is available in respect of dividend income to which the participation exemption does not apply, whereas such a credit is not allowed in respect of a capital gain that does not qualify for the participation exemption. Additionally, under article 28b, where a Dutch company holds directly or indirectly a participation of at least 25% in a company whose activities predominantly consist of portfolio investment or passive finance activities, such a participation is subject to annual appreciation at current market value at the level of the Dutch parent company. This means that any increase is taxed as an unrealised capital gain in the hands of the Dutch company. In such situations no credit for foreign taxes is allowed.

In order to reinforce these anti-abuse provisions article 13g of the Corporate Income Tax Act was amended effective as of the beginning of 2002, resulting in a further limitation of the scope of application of the participation exemption. As of 1 January 2002 the participation exemption is no longer applicable to dividends or capital gains stemming from EU resident subsidiaries interposed between a Dutch company and its subsidiary in respect of which the participation exemption would not apply if it were directly held by the Dutch company. Via a proposed bill that has recently been issued in the Parliament, the scope of application of this provision will also be extended to income from passive permanent establishments (e.g. finance branches) of, or indirectly controlled by, EU resident subsidiaries of Dutch companies, effective as of 1 January 2003.

A015 Royalties – Netherlands

- See paragraphs 36 to 37 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

B004 International financing – Netherlands

- See paragraphs 33 to 35 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

The Netherlands is willing to consider a change of the regime. However, to date no detailed information of such a change to roll back the measure is available. The measure is presently subject to state aid examination by the European Commission.

B005 Finance branch – Netherlands

- See paragraphs 33 to 35 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure was taken as of 1999 when Dutch national legislation was amended so that the exemption method is no longer applicable to passive foreign financing activities, even if there was an existing ruling in force. According to a published tax policy statement issued by the Ministry of Finance in 1999, rulings are no longer granted to permanent establishments performing passive financing activities (and were no longer granted even before the amendment of national legislation as of 1999). The number of rulings applied for and granted in 2000 and 2001 in respect of active finance branches were limited (from 2 to 3 on a yearly basis).

In addition, the measure has been subject to an amendment with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The new APA practice also applies to this measure. Since rulings for passive foreign financing activities were not requested and granted anymore, the introduction of the APA practice only concerns active foreign financing activities. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice, this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

E003 US FSC rulings – Netherlands

- See paragraphs 41 to 44 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to abolish the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation. The previous ruling practice in respect of US FSCs is no longer applicable.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice, this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.

E004 Informal capital ruling – Netherlands

- See paragraph 55 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

The conditions attached to the tax deduction by reference to notional return on informal capital have been amended by the introduction of the reform of the rulings practice, effective as of 1 April 2001. The changes to the application of the arm's length principle as a consequence of the introduction of the APA practice apply as such also to agreements on informal capital. The terms of agreements on informal capital are determined on a case-by-case basis and all aspects of such agreements are checked against OECD transfer pricing guidelines. The tax authorities may only conclude such an agreement if it is justified on the basis of the arm's length principle, that is, where the notional return on informal capital is attributable to a related party that has made the informal capital injection to the Dutch company in question.

In situations where the informal capital stems from a related party resident in a country other than the Netherlands the APA in question is disclosed on request (on the basis of a double tax convention) to that other country. As a precondition for the conclusion of an APA on informal capital the taxpayer must give prior consent to such a disclosure. In addition, in order to comply with the results of the Code of Conduct Group's work on transparency and exchange of information in the area of transfer pricing on a reciprocal basis, the Netherlands will supply information on informal capital APAs (and on other APAs) automatically to other Member States. The purpose of the disclosure of information on the informal capital agreement to the country from which the informal capital is provided is to enable that country to apply its tax legislation, in accordance with the arm's length principle.

In addition to the implications resulting from the introduction of the APA practice, the Netherlands has taken legislative action limiting the deductibility of interest paid on long term (and sub-ordinate) loans. As a result of an amendment introduced into the Corporate Income Tax Act as of the beginning of 2002 an interest on such a loan taken out with a related party is no longer deductible if the loan does not bear an arm's length interest rate (article 10, paragraph 1 sub d and paragraph 4). This amendment has reinforced the status of the arm's length principle in the Dutch legislation and, like the new APA practice, it applies equally to agreements on informal capital and has therefore limited the scope of application of the informal capital doctrine. Hence, contrary to the previous ruling practice, interest on such loans inferior to an arm's length rate can no longer be characterised as informal capital.

Z003 Non-standard rulings – Netherlands

- See paragraphs 41 to 44 of the Code of Conduct Group's report of 23 November 1999 (SN 4901/99).

Description of rollback action either already implemented or envisaged:

Action to amend the measure has been taken with effect from 1 April 2001 through the introduction of an APA (Advance Pricing Agreement) practice. The APA practice is based on the OECD guidance on such an instrument and the arm's length principle has been incorporated into Dutch legislation.

APAs are now made on a case-by-case basis. Standard rulings and fixed margins are no longer used. Each individual request will have to be substantiated with all relevant information (facts and circumstances at hand) needed for determining the arm's length terms for the APA. The APAs will normally be valid for 4-5 years unless the underlying facts or circumstances change. An APA will be audited in accordance with normal tax audit practice. In practice, this means that a taxpayer is subject to an audit with retroactive effect, on average, every five years. If the facts on which the APA is based do not correspond with the actual facts, the APA is not valid. All individual APAs are published taking into account the habitual confidentiality concerns of the taxpayer in question. Existing beneficiaries at 31 March 2001 will continue within the old regime until the end of 2005.